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(19,469.)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

NO. 97.

FRANK COLE BROWN,
Plaintiff in Error,
vs.
CHARLES DUNCAN GURNEY,
Defendant in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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Attorney for Defendant in Error.
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Cripple Creek, Colorado.

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On the occasion of the hearing of this case in the Supreme Court of the State of Colorado, Mr. Charles Duncan Gurney, defendant in error herein, was represented by the Honorable J. C. Helm,

who for many years was a justice of the Supreme Court of that state, and by Mr. Charles C. Butler.

The following briefs were prepared by Judge Helm and filed on behalf of this defendant in error in the Supreme Court of Colorado, and as no additional arguments suggest themselves to present counsel, the defendant in error will rely, on the hearing of the case in this court, upon Judge Helm's briefs.

This brief will consist of two parts. Part I contains Judge Helm's opening brief, and Part II his reply brief. We have not been favored with a copy of the brief of plaintiff in error to be filed in this court, but we presume that the argument will be practically the same as that contained in the answering brief filed in the State court, and that argument is considered and refuted in Judge Helm's reply brief.

In the opening brief we have changed the titles of the parties so as to correspond with their titles in this court, namely "Plaintiff in Error" and "Defendant in Error;" but in the reply brief it was impracticable to make such change, and we therefore leave it just as it is and offer it in reply to the argument that will undoubtedly be made by plaintiff in error.

The abstract referred to herein is the abstract filed in this court.

PART I.

This cause was tried to the district court without a jury; a jury being expressly waived by agreement of the parties. The findings or reasons of the trial court, if findings were made or reasons given by him, were not preserved and are not incorporated into the record. The writer of this brief was not present when the decision was rendered and is, therefore, not advised upon what grounds the learned Judge based his conclusions. Hence, in this opening argument, the case will be presented and the authorities reviewed from the standpoint of defendant in error exclusively. Doubtless counsel for plaintiff in error will develop in his brief the grounds upon which the court below based his view of the controversy, and will likewise cite the authorities upon which he and they relied. Such grounds, together with the authorities that may be referred to, will, of course, receive careful and thorough consideration in our reply to the argument on behalf of plaintiff in error.

While the case involves some nice questions of law, these questions are not complicated by disputed questions of fact and are unusually free from embarrassment; we do not apprehend that this Honorable Court will encounter much difficulty in reaching a satisfactory conclusion upon the merits.

There is no controversy concerning the facts; they appear in the record in the form of a stipulation agreed to by all the parties. This stipulation

will be found in the abstract beginning at page 18 and extending through to page 24. Accompanying the stipulation are exhibits representing the various proceedings, decisions, and orders of the Land Department upon which the stipulation is based; those exhibits begin at page 24 and comprise nearly all the rest of the abstract. The essence of the controversy as thus appearing may be briefly stated as follows:

I.

STATEMENT OF THE CASE.

The suit was brought by defendant in error on behalf of the Hobson's Choice mining location against plaintiff in error representing the Scorpion mining location in support of an adverse duly filed in the U. S. Land Office. Incidentally another suit is consolidated with the one above mentioned, in which one Small on behalf of the P. & G. lode location likewise sues plaintiff in error, representing the Scorpion. The latter action is also an adverse proceeding. The reason for consolidating the cases, or rather for trying them together, is made clear from the stipulated facts; the causes being submitted upon an agreed statement signed by counsel for all the parties.

As will be seen by turning to this statement of facts, no controversy exists concerning the performance of all the acts required by law in making a mining location on behalf of each of said claims; that is to say, it is admitted that the Scorpion, the

Hobson's Choice and the P. & G. locations were all made in full compliance with law in all respects *save one.* It is also admitted that since the location, the annual assessment work has been done on behalf of each, and no actual forfeiture or abandonment by either has taken place.

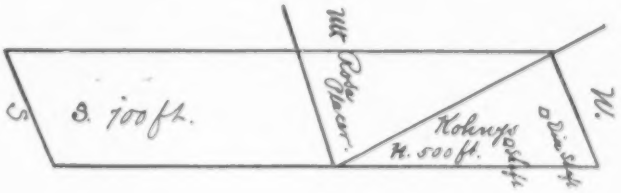
The three locations described, cover substantially the same tract of ground. The one exception above mentioned touching the validity of the respective locations, relates to the question as to whether or not at the time of these locations the territory covered thereby was *unappropriated public domain.* This exception will be found referred to in the statement, and repeated in connection with each of said locations in the following language: "*Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain.*"

THE KOHNYO LOCATION.

It appears that prior to the 28th day of May, 1895, a mining lode location called the Kohnyo was owned by The Cripple Creek Mining Company. The Kohnyo claim was segregated into two disconnected tracts by the Mt. Rosa patented placer claim; the Kohnyo being located across one corner of this placer; the Kohnyo did not adverse the placer patent application. The north end of the Kohnyo, comprising five hundred feet of the claim, was where the discovery of mineral was made; it also contained the discovery shaft

and the other workings and improvements of the claim. The segregated south end being seven hundred feet in length did not show mineral, and was without development work of any kind.

The following rude diagram illustrates with sufficient accuracy the Kohnyo claims together with the placer intersection. It shows the two segments into which the Kohnyo was divided by the placer conflict.



Upon application for patent of the Kohnyo, a receiver's receipt issued covering both of these segregated tracts. But the Land Department ultimately refused to issue a patent for said tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim, when thus separated by patented placer ground, could not be included *under one location* within the same patent from the Government. The commissioner of the General Land Office in making this ruling, however, gave the Cripple Creek

Company, applicant for patent, *the privilege of proceeding to patent upon either of the segregated tracts above described, at its election;* directing, however, that if the southerly tract of seven hundred feet were chosen, proof of mineral therein and expenditure of $500 thereon should be furnished; sixty days were allowed for the furnishing of such evidence, or the taking of an appeal from the commissioner's decision.

The order or decision just mentioned, by the commissioner, was entered on the 28th of May, 1895. It further provided that in default of such an election or appeal by the claimant, the entry "will be canceled to the extent of that portion of the claim lying south of the Mt. Rosa placer claim, without further notice." As will be seen hereafter, the Kohnyo, after various intermediate proceedings, ultimately proceeded to patent for the north tract of five hundred feet, *having elected to retain that tract.* Thus the southerly tract of the Kohnyo of seven hundred feet being excluded from the Kohnyo patent, became subject to relocation, and as above stated, the three mining locations connected with the present controversy, to-wit: the Scorpion, Hobson's Choice, and P.& G., each undertook to secure this tract. The question before the trial court, and the one upon which this court's decision must turn is: *By virtue of what act or proceeding, and at what date did the southerly tract of the Kohnyo revert to and become a part of the public domain?*

We will endeavor in a moment to show the pertinancy and decisiveness of this question. But in order to do so, a brief outline of the decisions and rulings of the Land Department with reference to the Kohnyo location or claim, together with the acts and doings of the Kohnyo claimant in the patent proceedings, and also the acts of the parties to the present controversy, are necessary. The stipulation of facts is quite extended, but the matters and things that are essential to a decision are, in our judgment, comparatively few. The following are believed to be amply sufficient, and to cover everything that is material to the controversy.

VITAL PROCEEDINGS IN CHRONOLOGICAL ORDER.

May 28, 1895:

Decision of commissioner of Land Office declining to embrace in one patent both of the Kohnyo tracts, and directing claimant to make its election between such tracts. This decision is sufficiently described above and the description need not be repeated (Exhibit A, Abs., original p. 49, print p. 24).

May 7, 1898:

Decision by Secretary of the Interior in which the intervening proceedings whereby the Kohnyo claimant sought to set aside the order of May 28, 1895, were dismissed; the action of the local Land Office and commissioner in denying the relief

sought by the Kohnyo claimant being sustained; and the order of the commissioner of May 28, 1895, suspended by the intervening proceedings being restored to full force and effect (Exhibit G, Abs., original p. 89, print page 45).

May 13, 1898:

Location by plaintiff in error Brown of the southerly seven hundred foot tract of Kohnyo, as the Scorpion Lode claim.

June 14, 1898:

The filing in the Land Office by The Cripple Creek Mining Company, the Kohnyo claimant, of an instrument of writing dated June 10, 1898, in which it elects to retain and patent the north end of the Kohnyo claim; and in which it also waives any right of further questioning or reviewing the decision of the Secretary of the Interior of May 7, 1898; affirming the decision of the commissioner of the General Land Office of May 28, 1895 (Exhibit H, Abs., original p. 101, print p. 51).

June 23, 1898:

Location of the Hobson's Choice lode claim by defendant in error Gurney, embracing the southerly seven hundred foot tract of the Kohnyo claim.

July 15, 1898:

Formal cancellation by the commissioner of the receiver's receipt previously issued to the Kohnyo claimant, in so far as said receipt covered or affected the said southerly seven hundred foot

tract of the Kohnyo claim (Exhibit K, Abs., original p. 113, print p. 57).

July 16, 1898:

Location by J. A. Small of the P. & G. lode claim, likewise covering the said southerly seven hundred foot tract of the Kohnyo.

July 15 and 16, 1898:

Filing of amended and second amended location certificates of the Scorpion claim.

EXHIBITS BELIEVED TO BE IMMATERIAL.

After the decision of the commissioner above mentioned, rendered on May 28, 1895, no appeal was taken; but The Cripple Creek Gold Mining Company, owner of the Kohnyo claim instituted proceedings against The Mt. Rosa M. M. & L. Company, owner of the Mt. Rosa placer, and one McConaghy, assignee, to re-open the matter and secure title to the lode, through the territory in conflict between that claim and the placer, and thus to unite and patent both of the segregated tracts of the Kohnyo; the position being taken and strenuously urged that at the time of the placer application for patent, the Kohnyo vein was known to exist in this conflicting territory; therefore that, under the law, the placer patent did not cover or include this vein; that, on the contrary, by virtue of the statute, the vein was excluded from the patent, remaining subject to location, and was duly covered by the Kohnyo location. These proceed-

ings are represented in the record by Exhibits "B," "C", "D," "E"and "F." (See Abstract original, pages 51 to 74, print pages 25 to 37.) The position of the Kohnyo claimant in this regard was overruled throughout; the Land Department holding, upon proofs, that the existence of the Kohnyo vein in the conflict territory was not known at the time of the placer application for patent.

These proceedings are concisely detailed in Exhibit "F." Their sole effect was to suspend the operation of the commissioner's decision of May 28, 1895; so that it was only by the ruling of the Secretary, above mentioned, on May 7, 1898, deciding finally against the Kohnyo claimant's contention of a known vein in the placer conflict, that the said commissioner's order of May 28 again became operative.

Exhibits "I" and "J" (see Abstract original pages 102 to 108, print pages 52 to 55,) represent exclusively proceedings before the Land Department, wherein the correctness of the amended survey of the north 500 foot tract of the Kohnyo, ordered by the department *after the election* of the Kohnyo claimant to retain and patent said tract, was challenged. The ground of this challenge was that such amended survey conflicted with a mineral lode location known as the Hypatia. Obviously these latter proceedings have nothing whatever to do with the southerly 700 foot tract of the Kohnyo, and consequently are not material to the present controversy; hence, they will receive no further notice.

QUESTION AT ISSUE RESTATED.

From the foregoing, the court will at once gather the essence of the present controversy. If the southerly seven hundred foot tract of the Kohnyo claim reverted to and became a part of the public domain on May 7, 1898, immediately and by virtue of the decision of the Secretary of the Interior then rendered, the Scorpion location is valid, and in that event, the Scorpion being prior to the Hobson's Choice and P. & G. locations, plaintiff in error Brown was entitled to judgment in this case.

If, on the contrary, the said southerly seven hundred foot tract of the Kohnyo did not so revert on the said 7th of May, but did on June 14, 1898, the date of the filing in the Land Office of the Kohnyo claimant's election to retain the north five hundred feet of the Kohnyo, so revert to and become a part of the public domain, then the Hobson's Choice location should have won. The latter location being made on the 23d of June, 1898, preceded the P. & G. location in point of time, thus being the first location of the territory in controversy after it became a part of the public domain.

But if the southerly seven hundred foot tract of the Kohnyo did not become a part of the public domain either on the said 7th of May or on the said 14th of June, but did revert to the public domain on July 15, 1898, when the entry for patent therefor was formally canceled by the commis-

sioner, then the P. & G. location ought to have prevailed. Since, in that event, both the Scorpion and Hobson's Choice locations would have been premature, and not upon the public domain, they would be consequently invalid. And the P. & G. location made on the 16th of July, 1898, would be the first legal re-occupancy and appropriation of this tract.

A careful study of the facts, together with the law involved, satisfies us that the Hobson's Choice location made on the 23rd day of June, 1898, was rightful, and that defendant in error Gurney, representing this claim, ought to have succeeded in the present action. We believe that under the law the southerly seven hundred foot tract of the Kohnyo reverted to and became a part of the public domain either on the 10th of June, when the election of the Kohnyo claimant to take the northerly five hundred foot tract was written and signed, or on the 14th day of June, when that election was filed in the Land Office. And we will now proceed to demonstrate to the best of our ability the foundation of our faith in the premises.

II.

ARGUMENT AND AUTHORITIES.

We ought, perhaps, to preface at this point with a reference to the possible bearing upon the present case of the Federal statute of 1881, to the effect that if neither party to the adverse suit establishes his right, neither shall recover. Mor-

rison's Mining Rights, (9th Ed. 425.) By virtue of this statute in adverse suits the verdict and judgment may be against both parties. Therefore, if the Scorpion location made by plaintiff in error Brown was premature—that is to say, was begun while the territory involved was still covered by the Kohnyo location, and was not a part of the public domain, then defendant in error Gurney must succeed to the extent of defeating the Scorpion application for patent. As to whether or not Gurney, representing the Hobson's Choice location, or Small, representing the P. & G. location, or either of them, would in such case be entitled to a judgment depends of course upon the question as to which of these locations is legal; they cannot both be valid. If the territory was public domain when the Hobson's Choice was located, it follows necessarily that the P. & G. location is void. If the land was not public domain when the Hobson's Choice was located, then the question recurs, was it public domain when the P. & G. location was made. We say this question recurs, for the reason that it does not follow that if the Scorpion and Hobson's Choice are invalid, the P. & G. is necessarily valid; for if the court should find that the southerly 700 feet of the Kohnyo did not revert to and become a part of the public domain upon the cancellation of the receiver's receipt in connection therewith, and that this effect had not followed either of the previous orders or proceedings, then under the statute of

1881, neither would the judgment go in this case for the P. & G. location.

FIRST. SCORPION LOCATION, PREMATURE AND INVALID.

As already observed, the attempted location of the Scorpion claim made on the 13th day of May, 1898, was in our judgment invalid. At that time the southerly 700 foot tract of the Kohnyo had not become a part of the public domain, and therefore was not subject to relocation.

It will be remembered that the owner of the Kohnyo undertook to have the commissioner's decision of the 28th day of May, 1895, reversed or modified; that it instituted certain proceedings against The Mt. Rosa M. M. & L. Company to show that the Kohnyo vein did not pass to that company by the placer patent, and consequently that the Kohnyo claim was valid from end to end. A number of hearings and orders took place in connection with these proceedings; but, as above stated, it is unnecessary to consider them here for the reason that they accomplish nothing save to suspend the commissioner's decision of May 28, 1895; that decision being ultimately confirmed in all respects by the decision of the Secretary of the Interior of May 7, 1898.

The result therefore of the decision of the Secretary of Interior on May 7, 1898, *was to restore operative effect to the commissioner's decision and order of May 28, 1895;* which had been sus-

pended pending all of the said various intervening proceedings.

Hence, on the 7th day of May, 1898, the decision and order of the commissioner of May 28, 1895, again became operative and effective, and the situation was precisely the same as if this decision had been rendered on the latter date, to-wit, May 7, 1898. It becomes necessary, therefore, for us to briefly analyze the commissioner's order of May 28, 1895, and determine its force and effect. *Did this order itself operate so as to at once restore the south 700 foot tract of the Kohnyo to the public domain? If it did not, then the Scorpion's attempted location made six days after the secretary's decision, and on the 13th day of May, was invalid.*

1st. Commissioner's decision of May 28th considered.

The decision of May 28, 1895, did not itself vacate or purport to vacate, the original location of the Kohnyo claim as to the southerly 700 foot tract thereof; nor did it in and of itself produce any immediate impairment of that location in relation thereto. As already observed, this decision simply declared that a patent could not issue covering both of the segregated tracts of the Kohnyo. *It gave the Kohnyo claimant permission to select either one of those tracts, and take his patent therefor.* Under this order he retained the right to choose the southerly 700 foot tract if he so desired, the condition being that if he chose this tract, he must within sixty days furnish evidence of mineral and

of $500 worth of work thereon; it also contained the additional declaration that if the Kohnyo claimant failed to make its election and determine upon which one of the segregated portions of the claim it would proceed to patent, such inaction would result in a cancellation of its patent entry as to the southerly 700 foot tract.

Thus we observe with reference to the decision of May 28th, that the Kohnyo location was not immediately avoided as to the southerly 700 foot tract; *and that the effect of this decision was to leave that tract still covered and protected by the original location.* The Kohnyo claimant had the privilege at any time before the cancellation of the entry, of selecting and retaining and patenting this tract; and if it did not choose to make any election in the premises, the result was that at the end of the sixty days, the entry would be canceled as to this portion of the claim. *Thus the interest of the Kohnyo claimant under its location, in the south 700 feet of the Kohnyo could be terminated in either of two ways, viz: by election to patent the north 500 feet, or by silence, (a failure to elect,) which the land department would, at the end of sixty days, construe to be a waiver of all right thereto.*

2nd. Election by Kohnyo claimant made on June 14, 1898.

But according to the record, the Kohnyo applicant did make an affirmative election in the premises. This election was evidenced by the

filing on the 14th of June, 1898, less than thirty days after the order of May 28, 1895, again became operative, of an instrument dated four days earlier, selecting the northerly 500 foot tract of the Kohnyo to be retained and patented; and expressly waiving all right to any further objection or review of the order of May 28, 1895, and decision of May 7, 1898. (Exhibit H, Abs., original p. 101, print p. 51).

Prior to the 14th of June, 1898, the southerly 700 foot tract of the Kohnyo had not reverted to the public domain, and become subject to relocation. For prior to that date the Kohnyo claimant had not expressed his desire or intention under the order of May 28, 1895, which order, as we have seen, became again operative on May 7, 1898. Until the 14th of June, 1898, when the election was filed—that is to say, *on any day or at any hour prior thereto, The Cripple Creek Company could have elected to retain and patent this 700 feet; and so long as this privilege remained, the tract unquestionably continued to be within and protected by the Kohnyo location. It was no more subject to location or to re-location than was the northerly segregated tract of 500 feet also belonging to said claim, upon which the Kohnyo claimant actually went to patent.* Had the Kohnyo claimant chosen so to do, it might on the 14th of June have elected to give up the northerly 500 foot tract, and have gone to patent upon the southerly 700 foot tract. Or it might have refrained from making any election,

and allowed the entry to be canceled as to the southerly tract.

We might dwell longer upon this subject, and perhaps by illustration and argument develop more fully our conclusion. But we deem further argument in this respect unnecessary. It necessarily and irresistibly follows from the foregoing *that appellee's attempted location of the south 700 foot tract on the 13th of May, 1898, was of no more validity or effect than if he had at that time attempted to locate the said north 500 foot tract of the Kohnyo.* The validity of the Kohnyo location is conceded, *no forfeiture thereof for failure to do annual assessment work is shown*, and the mantle of this location continued to cover both of the segregated tracts of the Kohnyo claim until, as we have seen, The Cripple Creek Company made its election to retain the north 500 feet and abandon the south 700 feet. The attempted location of the Scorpion by Brown was thus made *some twenty-eight days before the territory covered thereby became, or could have become, a part of the public domain.*

3rd. The rule of law involved in present discussion.

It is hardly necessary for us in this connection to state the rule of law upon which the foregoing and following discussions are based, or to cite authorities in support thereof; this rule or principle is very familiar to all mining lawyers; it has been frequently announced in Colorado.

"Only the unoccupied and unappropri-

ated mineral lands of the general government are subject to exploration and location. * * * To perfect a valid location the prospector must discover a vein or lode upon the *unoccupied and unappropriated public domain*; he must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate."

Armstrong vs. Lower, 6 Colo. 393, 395.

"The discovery shaft must be sunk upon unoccupied public land; that is to say, it must be outside of the lines of any patent or even of any valid location."

Morrison's Mining Rights, (9th Ed.) page 33.

Authorities to the foregoing effect can, of course, be indefinitely multiplied. The attempt to make a location upon territory that is at the time embraced within a prior, valid and subsisting location is void; the prospector is guilty of a trespass, even when he goes upon such a subsisting location for the purpose of making his discovery, and every subsequent act by him in attempting to perfect a location, is an additional trespass; moreover, where the attempted location is invalid upon this ground, the same cannot be perfected or rendered valid by the subsequent filing of an amended location certificate or the doing of any acts short of a complete relocation.

We therefore conclude that the "Scorpion" location is out of the race, and that plaintiff in error

Brown ought not to prevail. The 700 foot tract covered by the "Scorpion" was at the time of the attempted Scorpion location, included within a valid and subsisting location. And every one of plaintiff in error's acts constituted a trespass. Nor did the subsequent filing of either or both of his amended location certificates in any manner cure or tend to cure the invalidity. For this conclusion with reference to the effect of those amended location certificates we suggest two good and sufficient reasons: *First*, that as above stated, a location void *ab initio*, cannot be cured or made valid by amendment; and, *second*, that, as we will now proceed to show, at the time of the filing of the amended "Scorpion" location certificates, defendant in error had, by means of the "Hobson's Choice" location, effectually re-segregated the territory from the public domain, and no subsequent act of plaintiff in error could possibly relate back so as to invalidate the "Hobson's Choice" location.

SECOND. HOBSON'S CHOICE LOCATION, VALID.

But the question remains as to which, the Hobson's Choice or the P. & G. location, is valid, and should have recovered in the court below; or as to whether either of these locations is valid and should have so recovered. We unhesitatingly assert that at the time the Hobson's Choice location was made, the territory in question had become a part of the public domain, and therefore this location was legal. The doctrine of abandonment

alone determines this question and settles it in favor of the Hobson's Choice.

1st. Distinction between abandonment and forfeiture.

At this juncture it is perhaps as well to distinguish between the doctrines of abandonment and forfeiture. With this distinction, the court is doubtless familiar. The two leading differences are that abandonment *rests upon intention*, and *takes effect instantly;* while forfeiture takes place *by operation of law*, and is not complete until some one else has attempted *to initiate a right* to the forfeited property. We may add that forfeitures are always looked upon with *disfavor* and are *never presumed;* while as to abandonment, no such rule applies. Says Mr. Lindley, in his work on mines, section 643:

> "Abandonment is always a question of intention. In forfeiture the element of intent is not involved. It rests entirely upon a statute, and involves only the question whether the terms of the law have been complied with. Abandonment operates instanter. * * Forfeiture is not complete until someone else enters with intent to re-locate property." Citing numerous cases.

The locator or owner of a mining claim may undoubtedly abandon the same at any time prior to the issue of patent. There is no point of time at which he may not voluntarily give up all his rights to the property, prior to the actual transfer

of the fee by the patent itself. He may do this when his location is made, and before his application for patent; he may do it after his application for patent, and before issuance of his receiver's receipt; or he may surrender all his interest and rights under his location and his patent proceedings, after entry, and down to the actual issue of the patent itself. Concerning the correctness of these propositions, there can be no doubt. They are fully and clearly illustrated by numerous authorities.

A forfeiture *even* may take place after the entry of a mining claim. For instance, to insure absolute protection, the entryman should perform his annual labor after issue of the receiver's receipt; for if he does not, and, by reason of protest or otherwise, his entry is afterwards canceled, a forfeiture may take place. This is so because the Federal statute, section 2324, U. S. R. S. requires performance of such annual labor "until patent has been issued therefor." It is only by virtue of the *doctrine of relation* that an entryman is excused from performance of his annual work after entry. That is to say, it is only because the courts hold that the patent whenever issued, relates back to, and takes affect from the date of entry. But where for any reason the entry is canceled, and the patent does not issue, obviously this doctrine cannot apply, and does not prevent a forfeiture.

> "Nevertheless, in such case (failure to perform annual labor after entry) a

party runs the risk of the consequences in case his receiver's receipt should be canceled."

Morrison's Mining Rights, 9th Ed. 76.

Swigart vs. Walker, 30 Pac. 162.

In Smuggler Co. vs. Trueworthy lode claim, 19 L. D., 356, a relocation of the Trueworthy claim was made after the entry; an order for cancellation of the entry existed. The Secretary of the Interior, referring thereto, employs the following language:

"During the period covered by the order holding said claim for cancellation, all intervening claims to the land were necessarily *subject to such rights as might be finally accorded the entryman*, either on review before your office, or on appeal before the Department; and a re-location of the land by an adverse claimant during said period would not give the re-locator such an interest as would entitle him to be heard *as against the right of the entryman*."

Thus the Land Department clearly recognizes the fact that a re-location of a mining claim may be made after entry, and before cancellation of the receiver's receipt, *under conditions that would warrant such re-location in the absence of entry;* a re-locator simply taking the hazard of the entry being ultimately sustained. That is, a forfeiture becomes operative as of the date of its occurrence, after cancellation of the entry. If acts or omissions occur after entry, that would result in the forfeiture of a located claim before entry for patent, and if

the entry is subsequently canceled and set aside, the re-location made during the interval and after the forfeiture acts, is not void, and it may ultimately become good. Say Barringer & Adams, in their work on mines and mining, at page 375:

> "A mineral entry made during the existence of another entry for the same tract is irregular, but may be allowed to stand on cancellation of the previous entry."

2d. Abandonment, not forfeiture, in the present case.

But there was here no forfeiture, and the discussion and authorities on the subject of a forfeiture after entry, just referred to, do not in reality affect the present discussion. They are only introduced here for the purpose of showing that even as against forfeitures, which are never presumed and are always looked upon with disfavor, and which arise contrary to the owner's wish or intention, an entry for patent is not conclusive. But whatever the conclusion might be with reference *to forfeitures*, there can be no possible doubt with reference *to abandonment*. And we unhesitatingly assert that the action of The Cripple Creek Gold Mining Company, owner of the Kohnyo claim, in filing in the U. S. Land Office the written instrument on June 14, 1898, *was an abandonment* of the southerly 700 foot tract of that claim. We have already referred to, and sufficiently discussed the order or decision of the commissioner made on the 28th of May, 1895, in pursuance of which this action of the Cripple Creek Company was taken. It will

be remembered that by the said decision of May 28th, the Kohnyo claimant was given the privilege of electing which tract it would retain. Its action in making this election was *purely voluntary*. It could choose either tract, and by choosing voluntarily waive and abandon its right to the other tract; or it could remain silent, and if it remained silent, its interest in the south 700 feet would, at the end of sixty days, be treated as waived. Had it remained silent, there might have been more chance for discussion; though even then its silence would probably have been construed to be an abandonment.

Thus it is clear that the act of the Kohnyo claimant in making its election on the 14th of June, 1898, was purely voluntary. As to the effect of this action, there can hardly be different views. By electing to retain and patent the north 500 feet of the Kohnyo, the claimant effectively declared its intention to abandon the south 700 feet. The latter tract was thereby voluntarily excluded from the patent proceedings; it was discarded and the patent issued for the remainder. All rights of the Kohnyo claimant thereto then terminated. While a patent may issue covering two separate tracts of mineral land, yet, except in the instance hereinafter mentioned, each of those tracts *must be secured and evidenced by a separate location*. The election to retain the north 500 feet operated to exclude from the purview of the original Kohnyo *location* the south 700 feet. Moreover, this exclusion was

rendered all the more effective, and the restoration of the tract to the public domain was made all the more certain, by the fact that *the location acts including the discovery of mineral and the sinking of the discovery shaft, also the $500 in work and all other improvements, were upon the north 500 feet so retained by the claimant.*

This court is familiar with the principle of law that the including of the discovery shaft in a patent issued to another, renders the original location invalid, and restores the territory to the public domain.

> "Ever since the decision of the case of Gwillim vs. Donnellan, 115 U. S. 45, it has been the conceded and established law that if a locator permits an adjoining claimant to obtain a patent from the government for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he must be adjudged to have lost title to whatever territory is embraced within the limits of his claim. That case unquestionably decides, that if the locator permits the adjoining occupant to patent that part of his territory, it is the equivalent of an adjudication that he is without title, and the remaining part of *his location reverts to the condition of public lands*, and is open to location and purchase by other citizens and claimants, unless the locators in some legal fashion have initiated a new title."
>
> Miller vs. Girard, 3 Colo. App. 278.

See also Gwillim vs. Donnellan, 115 U. S., 45, cited.
Barringer & Adams, 299.
In Re Adams Lode, 16 L. D., 233.

But if the patenting of a discovery shaft *by another*, operates to invalidate the location and restore the claim to the public domain, how much more is this true when the *party himself* patents a portion of his claim including his discovery shaft, omitting a portion formerly covered by his location. By this act he unquestionably relinquishes, and voluntarily gives up the part of his location excluded from his patent, and the portion so given up at once becomes a part of the public domain.

Where one goes to patent for a part of his claim, excluding the other portion from his patent, even though there be no formal relinquishment, as there is in this case, the portion thus omitted reverts to, and becomes a part of the public domain.

In Re Elijah Welsh et al., 4 L. D., 172, the parties were endeavoring to purchase certain lands previously excluded from their patents. After denying the application upon another ground, the acting Secretary of the Interior says:

> "If further reason were necessary, it might be found in the facts that both applicants proved up and took patents for the residue of their respective entries after the elimination of the tracts in question. It might very properly be held that by so doing, in law, *they abandoned the tracts thus eliminated*, and surrendered whatever

of right they might otherwise have had in them."

The land referred to in the Welsh case was agricultural land, but that fact is of no significance; the rule would undoubtedly apply as well to mineral locations.

Thus we have *in the case at bar* three well recognized conditions under which territory reverts to the public domain and becomes subject to re-location, after having been segregated therefrom by a mining location, viz:

First. The voluntary abandonment of the south 700 foot tract by the claimant's election in writing, filed in the land office on the 14th of June, 1898; this alone operated to restore the tract to the public domain, and that result followed instantaneously.

Second. Had there been no such express and affirmative relinquishment the act of the Kohnyo claimant in excluding this tract from his patent, occurring at the same time would, in and of itself, have operated as an abandonment thereof.

Third. The act of said claimant in going to patent for that portion of his claim which included the discovery shaft would, also, in and of itself, alone, have operated to restore the remainder of the claim to the public domain; this result would have followed the patenting of his discovery shaft by another, and *a fortiori* it follows his own act in including the discovery shaft within a patent issued to himself.

3d. Rule where one of two conflicting lode claims goes to patent, not applicable.

We are aware of the fact that where *two lode claims* conflict, a party has been allowed to proceed to patent for the segregated portions of one of them without waiver of his rights to the portion in conflict.

Black Queen vs. Excelsior, 22 L. D., 343.
Branagan vs. Dulany, 2 L. D., 744.

The correctness of even that ruling has been challenged, and is today seriously doubted, although its recognition has been finally restored by the Department. But this rule is only applied where a controversy exists and *adverse suit is actually pending* between the two conflicting lode claims. Moreover, in such a case, the patentee *expressly declares in the Land Office that he does not abandon the conflicting territory; on the contrary, he proceeds with the clear and express declaration and understanding that he retains his right to contest with the conflicting claimant, the ownership of this tract.* Again, in that case, the presumption announced in Armstrong vs. Lower, 6 Colo., and other cases, that the vein extends throughout the claim, is indulged, and is a very important consideration. But in the case at bar, no such presumption exists. The contrary presumption is necessarily indulged. Two portions of the claims are segregated by patented placer ground, *which is presumed not to include veins;* in this respect the placer claim is

upon the same footing as would be a mill site or a piece of agricultural land.

4th conclusion as to Hobson's Choice location.

So we say, without fear of successful contradiction, that the election by the Kohnyo claimant, filed in the Land Office on June 14th, 1898, was an abandonment of the south 700 feet of the Kohnyo claim. Moreover that that abandonment took effect *eo instanti*. Not only is abandonment in this class of cases a question of intent, but it takes effect instantly upon the formation of the intent or performance of the act evidencing such intent. It is not necessary that the intent to abandon should be expressed in writing. Any declaration or any act of the owner showing his intention to discard or relinquish the claim is sufficient. It may occur at any time, *even after a full compliance with the law as to performance of annual labor and otherwise.* It may be proved under the general issue, and it may sometimes also be proved by the act or conduct of the party, even against his expressed assertions to the contrary. (See Lindley, sections 642, 643 and 644). Says Mr. Lindley in section 643, from which we have already quoted: "Abandonment operates instanter." Says Mr. Justice Beck in Derry vs. Ross, 5 Colo., 300: "Abandonment is a matter of intention, and operates instanter." (Also, Clark Min. Law Digest, 128).

There may be cases where courts would hesitate about recognizing an abandonment. But the

case at bar most assuredly does not belong in that class. The owner of the Kohnyo voluntarily, as we have seen, reduced its intention to writing, and filed that writing in the Land Offie, where it was duly recorded, and made effective as the foundation of the subsequent proceedings, and was notice to all the world. The right to abandon undoubtedly existed, and the abandonment *took effect at once, notwithstanding the fact that the receiver's receipt had not been formally canceled.* The act of the Kohnyo claimant in reality amounted to a cancellation of the receipt *by the entryman itself;* the formal recording of such cancellation by the Land Department was nothing more nor less *than a ministerial act.*

To say that under the circumstances defendant in error Gurney, who accepted the declaration of intention so solemnly made and placed of record, and re-located the property as the Hobson's Choice, shall lose the result of his expenditure and labor *merely because the ministerial act of recording the cancellation* of the receiver's receipt had not taken place, would be to *sacrifice substance to shadow;* it would be to so construe the law as to perpetrate a gross fraud by the flimsiest sort of a technicality. We have no fear that any court will ever uphold such a view.

THIRD. ATTEMPTED LOCATION OF P. & G. INVALID.

In view of the foregoing discussion, it is hardly necessary for us to take up or consider the

legality of the P. & G. location. This location rests, as we have seen, entirely upon the proposition that the southerly 700 foot tract of the Kohnyo claim did not become a part of the public domain until the formal cancellation of the receiver's receipt with reference thereto, on the 15th of July, 1898. Further, that the *effect of such cancellation was to so restore said tract to the public domain*, and thus, for *the first time*, to render it liable to re-location. This position must of course fall if our discussion in relation to the Hobson's Choice be correct; for if the Hobson's Choice location was valid, it follows necessarily that the P. & G. location is invalid. We will, therefore, abbreviate this branch of the discussion; in fact, it has already been largely anticipated.

The territory in question had, as we have seen, reverted to the public domain, and had been relocated prior to the cancellation of the receiver's receipt on the 15th of July, 1898. But if this were not so, we most emphatically assert that it did not so revert upon such cancellation, and in that event, the P. & G. location would of course be void. That is to say, if *before* the cancellation of the receiver's receipt as to said tract, the tract remained segregated from the public domain as a part of the Kohnyo location, such segregation continued *after* the cancellation of said receipt; and on the 16th of July, when the P. & G. location was attempted to be made, this tract was not a part of the public domain, and that location was illegal.

The cancellation of a mineral patent entry—of the receiver's receipt—does not of itself alone ever operate to restore the land to the public domain, and render it subject to re-location; it does not divest the claimant's title; it simply either checks or terminates the patent proceeding. The annulment of this instrument is, like its issuance, a mere incident in the proceedings prescribed for procuring title from the government; although the receiver's receipt while it remains in force, is evidence of a compliance with the preliminary patent conditions, and that the holder is entitled to Government title in fee, yet its revocation does not evidence either a forfeiture or a relinquishment of the location or claim by an applicant; it has no neccessary connection either with the segregation of the land from the public domain, or with its restoration thereto. If, at the revocation of a patent entry, the claim is subject to location, or to re-location, *it is because for some collateral reason the same would have been subject hereto had the entry not been made;* as where it turns out that a locator and applicant for patent is an alien and has not declared his intention to become a citizen, and the attempted location is therefore void *ab initio;* or where a forfeiture of the applicant's rights has taken place by reason of failure to do the annual assessment work. On the other hand, a large class of cases exists, where, upon the cancellation of a patent entry, the land remains segregated and does not revert to the public domain; as where the original

location was valid and no forfeiture has taken place, but the cancellation is upon the ground that the pre-requisite amount of $500 worth of work was not performed.

"Such cancellation (of the receiver's receipt) would not of itself render the ground subject to re-location. The applicant would simply be relegated to such possessory rights as he had prior to the initiation of patent proceedings, and such as he may have subsequently acquired."

Lindley, Sec. 772.

"The fact that an entry was canceled, would not of itself render the ground subject to re-location. The original location of the lode was not effected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right so long as there was a compliance with the requirements of law."

McGowan et al, vs. Alps Con. M. Co., 23 L. D., 115.

"The cancellation of Magruder's entry therefore simply set aside all that had been done towards the acquisition of a patent, and left his rights of possession under his location, and compliance with law as to yearly improvements, whatever those rights were, intact, and Magruder free to sell his possessory right the same as if no entry had been made or attempted."

In re John R. Magruder, 1st L. D., 527.

"The fact that an entry was canceled will not of itself render the ground subject to re-location. The original location is not affected thereby."

Barringer & Adams on M. & M., 316.

Authorities to this proposition might be extensively multiplied, but the foregoing are amply sufficient. The order of July 15, 1898, was not necessary to restore the 700 foot tract to the public domain. That result had followed the abandonment on June 14th preceding; which abandonment is expressly referred to and relied upon in the order of cancellation of July 15th. The latter order simply and solely put in different form the record of a pre-existing fact; giving the strongest possible interpretation to it, it amounted solely to an acceptance or ratification of the Kohnyo claimant's affirmative and express abandonment made previously and on June 14, 1898. It did not in any manner change or affect the status of the south 700 foot tract of the Kohnyo under that abandonment, or postpone, or otherwise change the taking effect of said abandonment.

The formality of cancelling the receiver's receipt on July 15th, was wholly ineffectual to destroy or jeopardize or affect the validity of the Hobson's Choice location made on the 23rd of June preceding. And it was even more impotent to give any life or legality to the attempted location of the P. & G. claim on the day succeeding, to-wit, July 16, 1898.

We deem it unnecessary to further prolong the present discussion; additional arguments, illustrations, and authorities could undoubtedly be adduced in support of our conclusions. But, until we learn upon what propositions of law and upon what

reasoning counsel for plaintiff in error relies, we feel that enough has been said; we will, therefore, in so far as the opening argument is concerned, submit the case to the court.

PART II.

Counsel for appellee have filed a very able, ingenious, and in our judgment, misleading argument of 118 printed pages. As to whether they have covered the matters really involved in the case may be doubtful; but certain it is that they have injected a vast amount of material foreign to the issues presented and tried; they have shown remarkable industry in the collection and citation of authorities, but we seriously question whether their discrimination equals their industry. With most, if not all, of the authorities so cited, considered in the abstract, we have no fault to find; but, unless we misapprehend the questions really involved, we venture the belief that the principles announced in a large proportion of these cases have but little more application here than have the causes of the precession of the equinoxes.

For the purpose of more clearly understanding the brief of appellee, it will be an advantage to prefix a short general outline thereof. This brief is divided into three main or principle "Divisions." The first division consumes fifty-four pages, barring a few pages given to a statement of the facts, and is entitled "Scope of the Review." The argument in this division is devoted exclusively to a contention that the stipulation of facts upon which the cause was tried in the court below is defective in two important particulars, and to an effort to show that these inadvertent omissions in the stipulation are fatal to the cause of appellant.

Division two of appellee's argument covers the next forty-five pages, and is entitled, "Appellant's Brief." In this division counsel *inter alia*, pay their respects to us in the following complimentary terms:

> "By persistent iteration, but without argument or reason to support it, appellant's counsel devote pages nine to seventeen of their printed brief to the development of the following theory."

And they attempt to controvert the view expressed in our opening argument upon two very important questions, viz:

As to the *suspension* of the operation of the commissioner's decision and order of May 28th, 1895, until the decision by the Secretary of the Interior, of May 7th, 1898—and as to the fact and date of *abandonment* of the southerly 700 foot tract of the Kohnyo mining location or claim.

The third grand division of counsels' brief is, of course limited to the remaining twenty-eight pages. It presents the merits of their side of the case. It is entitled "Premises in Controversy not segregated by Kohnyo Location," but incidentally discusses two minor questions. It first develops the view that the Kohnyo location never legally included the southerly end of that claim; and that until the Scorpion location was made, this tract always remained a part of the public domain. It follows that contention with the assertion that if the Kohnyo location did legally include the said southerly end thereof, the formal cancellation of

the entry as to such southerly tract, made on the 15th of July, 1898, related back to May 28th, 1895, and took effect and restored said tract to the public domain *as of said last mentioned date.* And, finally, this division of the brief closes with the contention that if the Scorpion location was originally premature because made while the ground was not a part of the public domain, the defect was cured and the location rendered valid by the filing of the amended location certificate thereof on the 15th day of July, 1898.

We will now proceed to consider the questions presented by appellee's brief more in detail. In so doing, we will follow the arrangement of subjects therein adopted.

I.

COUNSELS' TECHNICAL OBJECTIONS NOT WELL TAKEN.

As already suggested, nearly two-fifths of counsels' brief is devoted to the subject of defects or omissions in the statement of facts. It will be remembered that, although this was an adverse suit, yet it was tried by agreement before the District Court without a jury, and upon a stipulation of facts. Counsel approach the discussion of the alleged ommission by inadvertence of certain matters that should have been covered by this statement, in what we may respectfully term *an apologetic manner.* They take pains to repeatedly declare that this statement of facts, together with

the exhibits, were prepared by counsel for appellant without the assistance of counsel for appellee, or at least of the counsel who wrote appellee's brief; they say that they merely glanced over the statement sufficiently to see that it was broad enough to protect the interests of their clients.

We do not consent that the entire responsibility for this statement shall be placed upon us. It may have been originally drafted by some one on our side, but it was submitted to counsel for appellee in the utmost good faith, for the purpose of having it carefully considered, and all facts and circumstances of importance relating to the controversy included. The intended scope and substance of the controversy were well understood by them and we say that if any important matters were omitted, it was just as much the fault of counsel as it was our fault.

It is not strange under the circumstances that, in raising these questions, counsel are manifestly embarrassed. We are not surprised that they profess reluctance in trying to take advantage of the alleged omissions. Whether, in presenting these matters, counsel are in any manner guilty of violating the ethics of the legal profession, we leave without comment for this court to consider. That they themselves entertained misgivings, but finally concluded that duty outweighed any professional scruples on the subject, is shown by the following extract from page 33 of their brief:

"After a careful consideration of our

> duty in the premises, it seems to us that we owe it to our client to direct the attention of this court to what we consider fatal omissions in appellant's proofs. When a stipulation is presented an attorney for signature, his duty to his client requires a sufficiently careful examination to make certain that it contains nothing which he may not properly concede; but we know of no rule, either legal or ethical, that requires under such circumstances the protection of the opposition. * * * We believe also that where questions of fact have been mutually overlooked, as in the case at bar, the consequences should fall upon him who had the affirmative of the issue, and especially is this true when that person is himself responsible for the omissions."

But further preliminary comment in this connection is wholly unnecessary. Our contention is, as we will clearly demonstrate, that all this portion of counsels' brief is a fighting of windmills. That, as to one of the alleged omissions, no harm is done to either party thereby; and that as to the other alleged omission, counsel are mistaken—the matter being in fact amply covered by the stipulation and exhibits.

First. Appellee's Argument Upon Insufficiency of Identification of Ground, Not Sound.

Your Honors will remember that this is a three cornered controversy. Three different par-

ties, two of whom are appellants and the third appellee here, attempted to locate the same tract of mining territory; this tract had been previously covered by a location known as the Kohnyo claim; but, owing to the fact that the Kohnyo claim was divided by the corner of a patented placer claim into two parts, the Land Department declined to permit the Kohnyo claimant *to patent both ends of the claim;* the northerly end comprising about 500 feet, and the southerly end about 700 feet of territory. The southerly 700-foot tract thus included within the Kohnyo location became, by virtue of the ruling of the Land Department and subsequent action of the claimant thereunder, unoccupied public domain. The three different parties mentioned undertook to secure this tract by making locations thereof. The only question really submitted for trial was the point of time at which this tract reverted to the public domain. Upon the determination of this question rested the decision as to which of these locations was valid; it being conceded that in the three instances all location acts required by law were performed. Each of the locators contended that his location was the first one made after the ground became public and unoccupied property. Perhaps it is only just to appellee's counsel to add that in their brief here they advance the claim that, as a matter of law, the Land Department was mistaken, and the Kohnyo location never did include the tract in question.

The first omission counsel discovers in the statement of facts relates to the identity of the tract in question. That the tract covered by each of the three contesting locations is substantially the same counsel do not dispute. Nor do they dispute that, *as a matter of fact*, said tract is the identical southerly 700 feet of the old Kohnyo lode location. But they now assert that the stipulation of facts adopted in this case fails *to anywhere state* such identity. That is to say, while the territory covered by the three contesting locations was undoubtedly the southerly end of the Kohnyo location, yet by inadvertence appellant failed to see that this fact was incorporated into the agreed statement, and for this sin of omission alone he must pay the penalty of defeat.

We will not consume time or space with an attempt to show that counsel are mistaken in regard to this omission. What we most emphatically assert is that, assuming that counsel are correct in this regard, their conclusion as to the *effect* of the omission does not follow.

Authorities are cited to the proposition that this court will be governed in its determination of the case by the record as made in the court below —that it will not allow extraneous matters to be here incorporated into such record. Authorities are also cited tending to establish the further proposition that if the evidence wholly fails to disclose a fact so material as to be necessary to a party's success, he must fail, and this court has no

power to relieve him, although the omission was a mere inadvertence.

But these authorities do not reach or cover the specific objection; they are not at all determinative of the matter before us. The following actual facts presented by this record forbid their application.

These facts are: That the identity of the ground in controversy with the southerly 700 foot tract of the old Kohnyo location *was always assumed;* its existence *has never been, and is not now doubted;* and the sufficiency of the stipulation in this regard *was never raised* until counsel were engaged in the preparation of their present brief. The stipulation was not read by either side, in presenting the case to the trial court; but counsel for appellant, in reciting the substance of that stipulation *included this identity of territory* as one of the facts in the case, counsel for appellee *accepted this statement*, as did the trial court, and the argument proceeded and the cause was tried and determined upon the *full assumption* that this identity was a fact before the court. All these things, and more, are shown by counsel in their brief, from pages 31, 32, and 33, of which we quote:

> "Upon the trial in the court below, the stipulation of the facts was *not read by either party* to this controversy, or the case of Small v. Brown, which was also submitted thereon for decision. The substance of the agreed facts, as the same was then understood, *was recited to the court on oral argument and the case was tried upon the as-*

sumption that the conflict area described in the complaint herein is identical with that portion of the Mineral Entry No. 573 (the Kohnyo), lying southerly of line 25-26, Survey No. 7407, of the Mt. Rosa patented placer claim; and it *was further assumed upon the trial* that the agreed statement of facts *thus identified the premises in controversy herein.* With perfect good faith, and with *full assurance that the stipulated facts so identified* the tract in controversy, *this assumption was indulged by the court and all the parties to the controversy*, both in the case at bar and in the case of Small v. Brown. We might add that *we believe it to be a fact* that the conflict between the Hobson's Choice and the Scorpion claim is substantially, though not exactly, identical with that portion of the Kohnyo claim described as lying southerly of line 25-26, Survey No. 7407, or the Mt. Rosa placer claim. * * * From an examination of the record, it would appear to be a certainty that the case *was tried in the lower court upon assumptions* which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * * The truth of the matter is that, after the preparation, execution, and filing of the agreed facts, the stipulation, containing such facts was never again read or digested by any of the parties in interest. *The trial court and counsel for all the parties litigant simply assumed that the stipulation covered facts* which, upon investigation, we fail to find. One of these omissions, to-wit, the identification of the tract in controversy herein with that portion of the Kohnyo lode upon which the receiver's receipt was canceled, the writer who

> signed the sipulation in question *fully believed was covered.* * * * that the tract in controversy here is identical, or substantially identical, with that portion of the Kohnyo claim upon which the receiver's receipt was canceled (*a fact which we concede*, but a fact which the record does not show.)"

Then counsel, on page 32, referring to the other alleged omission from the record, say:

> "We contend that unless the appellant, who has the affirmative of the issue, has shown by the record that the Kohnyo claim was at the date of the discovery of the Scorpion, a valid lode mining location, then the Kohnyo claim would not operate to segregate from the public domain the ground in controversy, and under the other facts stipulated the Scorpion must prevail."

And, again, counsel on page 33, make the further admission that,

> "*It is true that neither of these questions was raised in the court below.*"

Thus our statement given, of the real facts, is fully borne out by the frank declarations and admissions of counsel in this court. *They candidly admit the assumption of the identity of the ground in controversy with the southerly end of the old Kohnyo location, by all parties in the court below, and the trial and decision of the case by the court upon this assumption.* They also, with equal candor, admit and declare to Your Honors that this assumption *is absolutely correct as a matter of fact.* Under

these circumstances we say that such identity will be taken for granted by Your Honors in the review here; that this court will try the case as if the particular matter had been formally incorporated into the record. Any other procedure would be most unjust, and would place a premium upon the perpetration of fraud. In this particular case we cheerfully accept the disclaimer of deceit or intentional suppression of facts by appellee or his counsel; but if such a rule as is here contended for were laid down by Your Honors, an invitation would be extended to the winning of causes by means of such fraud and deceit. To hold that where counsel have in the trial court conceded the existence of an important fact, and the court has tried and decided the case upon the assumption of the fact, yet they may, nevertheless, on appeal, stultify themselves and rely upon the absence of such fact from the proofs formally introduced, would make a mockery of justice. Such a holding is too shocking for serious contemplation.

Fortunately no such principle has yet found a lodgement in the law, and we firmly believe that it never will. *The true rule as established, we believe, without contradiction, is that where a certain fact is accepted in the trial court and the trial proceeds without objection upon the assumption that such fact exists, and the court decides the cause relying upon such assumption, neither party will be heard in the court of review to question the existence of the fact.* Such existence will there be presumed also,

and the cause will be reviewed from the same standpoint in this regard as it was tried in the court below. This is a very different thing from the omission of an important fact from the record; it clearly appears in the record and in the admissions by counsel.

> "Where a fact is assumed to be true in the trial court, it cannot afterward be contested in the appellate court."
>
> 2 Enc. Law & Proced., 675.

In a case where a deputy U. S. Marshal was defending the possession of property taken by him under execution, it was objected upon appeal that there was no evidence to support the finding that he was a duly appointed, qualified, and acting deputy United States Marshal. To which the court say:

> "Plaintiffs, by their questions during the trial, *treated the defendant as such deputy marshal*, and the evidence contains the return of summons, and also certificate of sale of the property in the execution in which he signed as deputy marshal. The question *was not raised by counsel* in the trial of the case," and refused to sustain the objection.
>
> Blish v. McCornick, 15 Utah, 188, 194.

In an action to recover upon a promissory note, it was objected upon appeal that there was no proof that plaintiff *was the owner* of the note. Counsel for defendant, in making a statement of his case to the jury *referred to the plaintiff as the owner of the note;* and he made other statements in

which such ownership was recognized. These were not statements of what counsel expected to prove, but they were made by him *as assured facts.* The court treated these as admissions, among other things, saying:

> "Where a cause is so conducted that the court and counsel may rightly, and do infer, that *certain facts are conceded or admitted,* the court may so treat them for the purpose of the instructions," and overruled the objections.
>
> Pratt v. Conway, 148 Mo. 291, 298.

In an action for trespass, objection being made upon appeal, to the failure of plaintiff to make *formal proof of title,* it appeared that defendant's witnesses had incidentally spoken as if plaintiff owned the property. Referring to this assumption the court says:

> "It may well be regarded *as an admission* of plaintiff's title, in view of the fact that it was not attacked at the trial or general term."

And the court significantly adds, referring to another well known principle:

> "Any alleged defects in the chain of plaintiff's title *should have been pointed out specifically* on the motion to non-suit, *so that plaintiff might have offered further evidence* in regard to it, if so advised," and overruled the objection.
>
> Humes v. Proctor, 151 N. Y. 520, 525.

Where the defense is that suit was brought before expiration of credit, *plaintiff's recital of the*

time of the commencement of the suit in his statement to the jury *is a concession of that fact* and cures formal proof of the same, where the objection *is first raised upon appeal.*

Consumers' Brewing Co. v. Lipcot, 47 N. Y. Supp. 718.

In a case where the width of a certain right of way was material, a map having been offered, received in evidence and admitted to be correct, on which the width of the right of way was marked; it was held, upon an objection, upon appeal, that the width of the right of way was not proved, that defendant *was in no position to complain of formal proof*, and the objection was overruled.

Allen v. St Louis, etc. Ry. Co. 137 Mo., 205, 217.

An objection that it was not proved that a foreign insurance company *had authority to do business within the state* cannot be made for the first time in the appellate court so as to control the decision.

Warner v. Delbridge, etc., Company, 110 Mich. 590.

In a case where the *existence of a contract was assumed* and an issue was made upon the question whether L. was bound to pay M. certain moneys under the contract, such issue being supported by evidence and an instruction to the jury, the attempt to challenge the existence of such contract binding upon L. was denied; The court says:

"By his (L's) *consent the issue was sub-*

> *mitted to the jury*, and failing to object or to except to the instruction or to the testimony about it, he cannot afterwards be heard to complain. Aside from this consideration, there is another proposition springing from the pleading wherein the defendant (L.) by his answer construed the contract according to the plaintiff's contentions. It being a matter of debate what the proper construction of it was, it may well be said that when a defendant tenders an issue upon the subject, *alleges a construction* in accordance with his view, he cannot afterwards be heard to contend there *was no issue concerning it*, and no evidence ought be introduced about it.
>
> Lemmon v. Sibert, 15 Colo. App. 136.

A cause was tried in the court below upon the assumption that the answer sufficiently put in issue the allegations of the complaint. Evidence was offered on both sides touching the issue, precisely the same as if the answer were entirely sufficient. Upon the review, defendant attempted, for the first time, to take his objection to the insufficiency of the answer. The court say:

> "Now, since the case has come here for the first time in its whole history, and after all opportunity for amendment is gone, objection is taken to the form of the denial; the objection cannot be considered; the point should have been made below, and not having been made, it is waived."
>
> Gallup v. Workman, 11 Colo. Appls. 312.

In the trial of a cause below, a certain lease *was assumed to be legal.* And the trial proceeded

to a conclusion upon that assumption as a fact. On appeal the objection was made that the lease violated an act of congress and was void. This court said:

> "It is argued by counsel for appellants that the judgment should be reversed, for the reason that the consideration of the note sued upon was illegal because the lease in question was a violation of the Act of Congress of February 25th, 1885, entitled 'An Act to Prevent Unlawful Occupancy of Public Lands,' 23 U. S. St., 321. This question seems to be presented for the first time in this court. The lease claimed to be illegal was introduced by appellants themselves, its illegality was not urged in the court below, and is not assignable for error in this court. It follows that the question is not before the court and cannot be considered."

Jennings v. First Nat'l Bank, 13 Colo. 423.

> "The cardinal principle of appellate procedure, which requires that questions of which a review is sought shall first be appropriately brought before the trial court for decision, makes it indispensably necessary that positions should not be shifted on appeal. For if parties were allowed to change positions, the appellate tribunal would often be compelled to decide questions as purely original ones, and this certainly is not the purpose for which they were created."

Elliott on Appellate Proced., Section 489.

> "Still another phase of the principle appears in the case which adjudges that a party who *has treated a contract as valid* in

the trial court cannot impeach it on appeal, for illegality."

Elliott, Sec. 491.

"Upon the same principle, it is held that a party who affirms the validity of a contract in the trial court must proceed upon that theory throughout the litigation in the appellate tribunal."

Elliott, Sec. 492.

"It is held that if the parties put a definite construction upon the pleadings in the trial court and induce the court to act upon that construction, they must adhere to it on appeal."

Elliott, Sec. 494.

"Thus, if a court has jurisdiction in actions of replevin only when the property is situated in the county, the failure to make the point that the property in dispute *is not within the county* will preclude the party from making it on appeal."

Elliott, Sec. 500.

Commenting upon the reason for the rule thus stated and illustrated by Mr. Elliott, that learned author, in Section 496, says:

"The rule is one required by logic and by practical considerations, since without it inconsistent positions might be assumed without any other restriction than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, in as much as its principal purpose *is to prevent deception*, since without it *parties might mislead their adversaries by assuming one position in the trial court and another on appeal.* Nor could there be an

orderly administration of justice without such a rule."

We are aware that some of the illustrations given are cases where an issue in the pleadings or the legality of a contract was assumed, or where the record was entirely silent concerning a material fact. But these illustrations strongly reinforce and emphasize the other citations above made. How much stronger is the proposition that, where the existence of a material fact *is affirmatively and expressly assumed by both parties and the court in the trial of the cause, the existence of such fact should not be denied upon appeal.* We are certain that such a denial will not be allowed by this court.

Second. Appellee's Contention That Stipulation Fails to Show Validity of Original Kohnyo Location Considered.

But counsel imagine that they have discovered another mare's nest in connection with the stipulation in this case; they say that this stipulation does not show *that the original Kohnyo location was valid;* they insist that the validity of that location was an essential fact precedent to a decision of the real merits of this controversy; that unless the Kohnyo location was valid, the territory purported to be covered thereby was never segregated from the public domain. And that, therefore, it would follow that the Scorpion location, which was at-

tempted to be made admittedly prior to the date of appellant's location, the Hobson's Choice, must necessarily prevail. Therefore, they say that the inadvertence of counsel in omitting from the stipulation a statement that the Kohnyo location was valid must be held fatal to the cause of their client.

This is the second alleged defect in the stipulation, inadvertently and mutually made, upon which counsel rely strenuously to secure an affirmance of the judgment by this court. As to this alleged defect, the conditions in the trial court were practically the same as the alleged want of identification of the ground which we have already considered. In the presentation of the case to the trial court, *counsel for both sides assumed that the Kohnyo was a valid location;* the case was argued and presented throughout *upon that assumption;* no suggestion or intimation came from appellee or his counsel in any manner questioning the existence of this fact.

Referring to this subject, at page 33 of their brief, counsel say:

> "It is true that *neither of these questions* was raised in the court below"—the other question being the identity of the ground in controversy, already considered.

The court below tried and decided the case upon the assumption of this fact. The cause in that court was conducted throughout upon the hypothesis that the sole defect in the Kohnyo location was the one occasioned by its conflict with the Mt. Rosa Placer; that, by reason of such conflict,

the Land Department reached the conclusion that both of the disconnected ends of the Kohnyo could not be covered by the Kohnyo patent; and, finally, that, as already stated, the ruling of the Land Department, together with the action of the Kohnyo applicant under that ruling, operated to restore the south 700 foot tract of the Kohnyo location to the public domain. The question reserved for trial in this case in connection with each of the new locations contending for the ground, viz:

> "Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain,"

was treated as resting upon the further question as to what date the southerly tract of the Kohnyo was restored to and became unappropriated public land.

Had counsel, at the trial, in any manner relied upon these alleged defects in the stipulation, or had they even called attention to or suggested the same, there is no doubt but that, if the omissions existed, they would have been supplied. A stipulation is no more binding or sacred than evidence offered in the ordinary way at the trial of a cause. If the court's attention is called, by motion for nonsuit, or otherwise, to an inadvertent omission in evidence, he may ordinarily, in his discretion, allow the same to be cured by receiving additional proofs. And certainly the rule would be no more pronounced in a case like the present, where the

party objecting is himself partially responsible for the inadvertent omission. For there is a difference between the case of evidence offered pro and con, in the ordinary course of a trial, and the case of a stipulation where *both sides unite in an attempt to state all the salient and important facts in the case.*

We say that our argument and authorities above upon the question of the identity of the tract of ground in controversy with the southerly end of the Kohnyo claim, are also applicable to the discussion and determination of the present contention, and that appellee will not now be permitted to challenge the validity of the Kohnyo location.

But all of the foregoing touching this second alleged omission from the stipulation of facts, is unnecessary. *The point is not well taken on the evidence.* Counsel are wrong in assuming that the stipulation and exhibits fail to show the validity of the Kohnyo location.

We treat with charity the abandonment by counsel of the theory upon which the cause was tried in the lower court, and their reliance upon the inadvertent omission of facts which they treated as existing. It may be that zeal for the cause of their client, or difficulty in finding something substantial to support that cause, would excuse their action in bringing such a question to the front. But these considerations can hardly justify the

attempt to ignore, belittle, or pervert the stipulation in order to sustain such a contention.

They admit that a receiver's receipt sufficiently evidences the performance of the necessary acts of location. A proposition that every mining lawyer knows is too well settled to permit of dispute. They say, at page 48 of their brief:

> "So, while we concede that a properly authenticated certificate of purchase or final receiver's receipt affords in this case proof of the performance of all statutory acts requisite in the discovery, location and development of a mining claim," etc.

And at page 84 they say:

> "On March 6th, 1895, the Khonyo claimant *entered both of the Khonyo tracts* at the Pueblo Land Office, purchasing and paying the United States for the area therein contained. On that date *a final United States Receiver's Receipt was issued* to the Cripple Creek Gold Mining Company as a muniment of title. So far as appeared upon the face of the record made of this transaction, the United States had, by its proper officers thereunto duly authorized, sold and received payment for both of these tracts, and while the judgment of the Commissioner entered on May 28th, 1895, decided that the transaction was in derogation of the public land laws, so far as the southerly tract was concerned, the record shows that the receiver's receipt issued to the purchaser was still extant and the purchase money still retained by the vendor."

But they accompany the concession made in

the first of these extracts with an assertion that the Receiver's Receipt or certificate of purchase *was held for cancellation* by the action of the Land Department. And they attack the receipt or certificate of purchase admitted in the second of these extracts to have issued upon the Kohnyo, in so far as the southerly end of the claim is concerned, on the ground that its entry was *in derogation of the public land laws* and void.

These two contentions will receive proper consideration hereafter under the proper headings in this brief. At the present time we simply wish to call the attention of Your Honors briefly to the status of the Kohnyo location in response to counsel's assertion that the stipulation is silent as to its validity.

Upon this particular subject we first call Your Honors' attention to the foregoing extract from page 24 of counsel's brief. They there say that the *record here shows* issue of the final receipt to the Kohnyo, payment for both ends of that claim, and that on May 28th, 1895, said money was retained and the receiver's receipt was still extant as evidenced by the stipulation of facts.

Paragraph numbered one of the stipulation in this case recites, "that on the 28th day of May, 1895, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereto attached and marked "Exhibit A." Said 'Exhibit A" refers specifically to Mineral *Entry No. 573*, made March 6th, 1895, by the Cripple

Creek Gold Mining Company, upon *the Kohnyo* and Fortuna Lodes;" it recognizes that entry as an existing fact; it does not cancel the same or in any manner question its legality in so far as the discovery of mineral upon the public domain and the performance of all the necessary acts of location are concerned; on the contrary it clearly affirms the performance of such acts and the validity of the Kohnyo location; it simply declares that, in accordance with a previous decision, the applicant cannot be permitted to *include in the patent two noncontiguous tracts;* and it then gives said applicant the privilege of choosing *upon which of the two tracts* it would proceed to patent.

By what process of reasoning counsel can say that this holding operates to do away with the presumption of a valid location, created by the making of the entry, we cannot understand. To our mind Exhibit "A" is equivalent to the following statement by the commissioner, to the Kohnyo applicant:

> "You have discovered mineral upon the public domain and have performed all of the acts necessary to constitute a valid location of the Kohnyo claim; you have complied with the law in your patent proceedings leading up to the final entry; you are entitled to a patent, but owing to the principle announced in the Silver Queen decision, you cannot have both of the noncontiguous tracts within the surface boundaries of your location and claimed by you; you may, however, select either one

of these disconnected tracts and proceed to patent therefor."

If Exhibit "A" is not a clear recognition and reaffirmance of a valid location of the Kohnyo claim, then we confess that we do not understand the English language.

Exhibit "B" recognizes the position taken in Exhibit "A" throughout; in addition it shows that the Kohnyo applicant asked permission to prove that the placer applicant *knew at the date of his application for patent, of the existence of the Kohnyo vein through the corner of the placer claim* and between the segregated ends of the Kohnyo location. The department recognizing the principle that if the placer applicant *did* know of the existence of that vein at the date of his application, the vein did not pass with the placer patent—the title thereto remaining in the United States—and it could be properly covered and included within the Kohnyo location, thus connecting the two ends thereof, granted the privilege asked by the Kohnyo applicant.

Surely there is nothing in Exhibit "B" that tends to weaken in any manner the force or effect of Exhibit "A"; on the contrary Exhibit "B" extends to the Kohnyo applicant a privilege which, if his contention were sustained, *would have enabled him to include within his patent both ends of the Kohnyo location.*

Exhibit "F" is dated October 22, 1897, nearly two years and five months later than the date of

Exhibit "A"; it recites the proceedings shown in Exhibits "A" and "B" and then, after reviewing at length the evidence offered by the Kohnyo applicant to establish knowledge of the Kohnyo vein by the placer applicant in the placer ground, at the time of the placer application for patent concludes that the Kohnyo applicant has failed to maintain its contention. The learned commissioner says:

> "Upon a careful consideration of the entire record of this case, including, the able briefs and arguments of counsel, I have reached the conclusion from the evidence, and accordingly so decide, that the contestant has failed to show by a clear preponderance of the evidence that at the time the application for patent of the Mt. Rosa Placer claim was filed, it was known that the ground in controversy herein contained a valuable vein or lode bearing mineral. * * * And contestant's petition to be allowed under departmental decision in case of the South Star Lode Claim (20 L. D. 204) to enter and receive a patent for the ground in controversy is hereby denied."

An appeal being taken from the decision of the commissioner referred to in Exhibit "F", on May 7, 1898, the Secretary of the Interior pronounced a final decision of affirmance. This decision refers to the attempt of the Kohnyo claimant to prove knowledge of the existence of the vein by placer applicant, then proceeds to analyze the evidence and discuss the law involved upon the authorities; it concludes by holding that the com-

missioner rightly placed the burden of proof to establish such knowledge upon the Kohnyo applicant; and that such applicant had not sustained the burden.

Exhibit "H" is especially significant in this discussion. It was labeled "Election by C. C. G. M .Co. (the Kohnyo applicant) to take north tract;" it refers to the *Kohnyo final entry No. 573*, made on March 6, 1895, and also to the commissioner's order or decision (Exhibit "A") of date May 28, 1895, and finally to the decision of the Secretary of the Interior of date May 7, 1898; it is signed and sworn to by the President of the Kohnyo applicant (company), and after making the references above mentioned and stating that he is fully advised as to those matters, the President says:

> "With authority so to do, affiant here waives the right of review of the last mentioned decision and *elects to retain in said M. E. No. 573* the portion of the Kohnyo Lode claim which is described in the above-mentioned letter of the commissioner as 'the five hundred feet on the north.'"

Thus Exhibit "H" constitutes another recognition of the continued existence of the Kohnyo location; it also recognizes the *validity of the entry of the Kohnyo claim* for patent; it is an *acceptance of the right of election* given by the decision of the commissioner, covered by Exhibit "A."

Exhibit "H" is the last portion of the evidence relating to matters that occurred *prior to* the attempted location of the Hobson's Choice mining

claim, and it was dated subsequent to the attempted location of the Scorpion; these being the claims now contesting before this court. Counsel say that we should have included in the stipulation of facts a statement that the patent did afterwards actually issue to the Kohnyo claimant for the portion of the ground so selected. We do not see the force or the necessity of this requirement. The acts subsequent to the making of the last of the contesting locations could hardly affec the status of the ground in dispute at the date of those locations; besides, as we have seen, counsel have admitted that an entry is sufficient, and that a patent is unnecessary.

The situation at the date of the making of the last of the contesting locations thus disclosed by these exhibits, is, in brief, as follows:

According to the record before this court, the Kohnyo claim had passed to final entry; this final entry had been recognized by the commissioner of General Land Office and the Secretary of the Interior; the question litigated in the land department for a period of about three years, as to the knowledge of the placer applicant at the date of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claimant; the Kohnyo claimant had thereupon accepted this decision, acquiescing therein, and had availed himself of the privilege extended by the commissioner's order (Exhibit "A") and elected to retain

the northerly tract of the Kohnyo claim, thus relinquishing the southerly tract thereof; it should be added that the entry as to the southerly tract had been formally canceled—Exhibit K.

There is not a single word in the stipulation or exhibits that weakens or in any manner contradicts these facts. And it seems to us like an attempt at juggling for counsel to contend that they do not show at least, *prima facie*, the validity of the Kohnyo location. In view of the situation as thus admitted, we say that counsel are absolutely mistaken in their present contention.

That counsel are hard pressed in their effort to maintain this contention is shown by their resort to and struggle with Exhibits "I" and "J". Exhibit "I" is dated April 27th, 1899, 11 months subsequent to the Scorpion location and ten months subsequent to the Hobson's Choice location. By the commissioner's order May 28, 1895, (Exhibit "A"), the Kohnyo claimant was required, in the event the northern end of the claim was selected, to make an amended survey so as to establish the southerly end line of the claim at the point where the lode intersected the placer; this amended survey was made, but in running the lines a slight variation from the original survey took place; thereupon the owner of another claim not in any way involved in the present controversy, the Hypatia, protested against the Kohnyo as described in the amended survey.

He claimed that the amended survey extended

the line too far southerly and encroached upon the Hypatia. Exhibit "I", being a decision by the commissioner, after reciting these things, orders a hearing between the Hypatia and the Kohnyo in relation to the interference, by the changed survey, of the location of the Kohnyo with the Hypatia; it also denies a request made by the Kohnyo claimant that the Fortuna, another claim included within the Kohnyo entry, be allowed to separately proceed to patent; giving the Kohnyo claimant, however, the privilege of going to patent upon the Fortuna by cancelling the entry wholly as to the Kohnyo claim.

Exhibit "J", which is a decision of the Commissioner of the interior of date three months later than Exhibit "I", refers to an intermediate holding by which the commissioner's ruling in Exhibit "I" was in one respect overruled; the Kohnyo claimant being permitted to proceed to patent for the Fortuna lode *without cancelling the Kohnyo entry;* it then recites the withdrawal of the amended survey made by the Kohnyo and objected to by the Hypatia, the dismissal of the Hypatia protest, *and the allowance of sixty days within which to make another amended survey of the southerly end line of the Kohnyo, under the decision of May 28th, 1895.*

How Exhibits "I" and "J" can affect the discussion of the present question we do not perceive; they both recognize as valid and binding the positions taken by the commissioner in Exhibit "A";

there is nothing in either of them to show, or tending to show, that the original location of the Kohnyo claim was not valid, or superseding or setting aside the entry of that claim on May 28th, 1895. On the contrary the very latest declaration by the Secretary of the Interior, in Exhibit "J", made over a year subsequent to the location of the three contesting claimants, before this court, of the ground in the controversy, affirmatively recognizes the validity of the Kohnyo location and entry by giving the Kohnyo applicant time to make an amended survey establishing its southerly end line adjacent to the placer ground; and it announces, in effect that if such amended survey is made within the time limited, the Kohnyo can go to patent.

We feel that an apology is due the court for spending so much time upon this specific question. Counsel has forced us to dwell upon this matter at length by their contention that there is nothing before the court tending to show the validity of the original Kohnyo location. We submit that the evidence is amply sufficient upon this question, and that counsels' contention has no foundation whatever in fact.

Counsel fail to discriminate between the case at bar and the case where an entry is suspended or held for cancellation upon the ground of fraud or failure to show compliance with law in some particular. *The Kohnyo entry was not held for cancellation in any such sense or at all; the legality and*

validity of the entry was always recognized from first to last; there was never any declaration of the land department questioning the location or compliance with law in making the entry; the territorial scope of the entry alone was challenged. The land department said:

> "You have taken in two segregated pieces of ground; this does not invalidate your location or your entry, the entry may stand; but neither it nor the patent can cover more than one of the tracts. You may choose which of these tracts you will retain and proceed to patent for."

And even the final declaration, in exhibit "J," upon which counsel lay so much stress in their brief, is equally clear upon this question. The Kohnyo claimant is to be notified that it must make an application for an amended survey under the decision of May 28, 1895, or it must appeal. And in case of default, that the entry would be canceled as to the Kohnyo lode claim. This does not point out a defect in the Kohnyo location, or even in the Kohnyo entry. At least a year prior to that time the Kohnyo applicant had made its election to take the northerly tract of the Kohnyo location; it had not, however, caused a sufficient survey to be made establishing the southern boundary thereof for patent purposes. This declaration is equivalent to saying to the Kohnyo applicant:

> "Your location is valid, your entry proceedings are regular and complete, but, owing to the exclusion of the southerly end, it becomes necessary for you to estab-

lish the new southerly end line at the place where the tract retained is contiguous to the placer."

Third. Effect of the Act of Congress of 1881.

In our opening brief we adverted briefly to the probable bearing upon this case of the Act of Congress of March 3, 1881. As Your Honors will remember, this statute provides that if, in an adverse suit,

> "title to the ground in controversy shall not be established by either party, the jury shall so find and judgment shall be entered according to the verdict."

This act has been frequently construed and is always held to mean that it is not sufficient to entitle the applicant for patent to a judgment in his favor, that the plaintiff fails to prove title to the ground in the contesting location. It is held that before defendant, who is a patent applicant (in this case the Scorpion owner), can have judgment, *he must prove that his claim has title to the ground.* And it also held that, in making such proofs, all the requirements of law, relating to the location of a mineral claim must be shown to have been complied with. And, finally, the authorities declare that, if neither the plaintiff nor the defendant has made such proofs, then the jury must return a ver-

dict accordingly and judgment be entered that *neither party is entitled to the ground.*

McGinnis v. Egbert, 8 Colo. 55;
Becker v. Pugh, 9 Colo. 589;
Manning v. Strahlor, 11 Colo. 453;
Lindley on Mines, §763;
Perego v. Dodge, 163 U. S. 168;
Brannigan v. Dulaney, 2 L. D. 751.

But a valid location can only be made by compliance with all the provisions of the location statutes, and then only upon the public domain. It would seem necessary, therefore, that in order to recover in an adverse suit, the successful party, whether plaintiff or defendant, should not only show that he complied with all the provisions of the location statutes, but likewise *that at the date of his location the territory was public domain.* For the performance of location acts, such as the sinking of the discovery shaft, upon ground that is not a part of the public domain, avails him absolutely nothing, and is fatal to his right to recover.

Armstrong v. Lower, 6 Colo. 393, and other cases.

It would seem to follow that before appellee was entitled to recover in this action, he was bound to show that the ground in controversy was, at the date of his location, a part of the public domain. It was not sufficient for appellant (the plaintiff) to fail to show (if such failure had occurred) that this ground was not a part of the public domain at the date of the Scorpion location.

And the foregoing proposition is very strongly emphasized by the fact that under the stipulation *this was the specific question reserved for trial.*

Hence we say that, in view of the said Act of Congress of 1881, and in view of the further fact that the question whether the ground in controversy was a part of the public domain at the date of the respective contesting locations was expressly and affirmatively made the very essence of the trial, it looks as if counsel's contention, if accepted by this court, *would itself necessitate a reversal of the judgment.*

We do not rely upon this proposition; we merely mention it in passing. We have demonstrated that this contention is not true; we have shown that the exhibits *do* establish without contradiction the existence and validity of the original Kohnyo location. But, if we had not done this, and if counsels' contention were true, that this issue remained wholly unproved, the judgment of the court below may be in direct conflict with the Act of Congress.

II.

APPELLEE'S VIEW AS TO SUSPENSION OF ORDER IN EXHIBIT "A" AND AS TO ABANDONMENT OF SOUTHERLY KOHNYO TRACT CONSIDERED.

We come now to the second grand division of appellee's brief. As already indicated, this portion

of that argument is devoted to two propositions, viz:

Answering our brief counsel deny that the proceedings shown by the exhibits as taking place before the land department, between May 28, 1895, when the first order was made denying the right to patent both tracts of the Kohnyo location and May 7, 1898, when the decision of the Secretary of the Interior affirming that order of the commissioner was pronounced, *suspended the operation of the commissioner's order during the intervening period;* and they discuss at length the law of abandonment of mining locations, and undertake to demonstrate that the filing by the Kohnyo claimant, in the land office, of its written election to retain the northerly tract of the Kohnyo claim *was not a relinquishment or abandonment of the southerly tract thereof*—the ground in controversy.

First. Operation of Commissioner's Order Was Suspended by Intervening Proceeding.

Counsel insist that, notwithstanding the intervening proceedings during the period above mentioned, covering about three years, the order of the commissioner, of May 28, 1895, remained operative; that since, by this order, the Kohnyo applicant was required to make its election, within sixty days from said date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion would

be canceled, and since the Kohnyo claimant did not make such election until June 10, 1898, the entry was canceled as to the southerly portion of the Kohnyo claim, (which is the ground in controversy,) at the expiration of sixty days, and on or about July 28, 1895; and that by virtue of such cancellation this tract then reverted to the public domain; also that, since the Scorpion location of this ground was attempted to be made prior to the Hobson's Choice location thereof, it must prevail.

This argument is ingenious but unsound. Counsel are obliged to show that the commissioner's order, of 1895, remained operative notwithstanding the proceedings already detailed, in the land office; about ten pages of their brief are devoted to the citation of authorities touching the questions of supersedeas and implied supersedeas in the courts, supersedeas under departmental practice, etc; and they reach the conclusion that since no direct appeal in the ordinary way was taken from the commissioner's decision, and no order was expressly entered by a court, or by the land department, granting the supersedeas, the commissioner's decision must have remained operative.

It seems to us that, in their zeal, and in their extremity, counsel are sacrificing the substance to the shadow. Certain it is that the land department itself *considered* the operation of the order of May 28th, '95, as suspended during this period; each and every of the intervening steps demon-

strates this fact; it was treated by the department as so suspended; no attempt was made to compel the Kohnyo applicant to proceed to patent the northerly tract; no attempt was made during this period to compel an amended survey to fix the southern boundary of that tract, or to cancel the entry upon failure to make such survey; nor was any order of any kind made that shows or in the slightest degree tends to show that the department regarded this order or decision as operative; on the contrary, fully demonstrating the view of the department that the operation of this order or decision was suspended, are the following facts:

That on June 10, 1898, and about five weeks after the decision of the Secretary of May 7, 1898, a formal election, in writing, by the Kohnyo claimant, to retain and patent the northerly tract, was received, recognized, and filed; that on July 15, 1898, the Kohnyo claimant was given sixty days within which to take steps to have the amended survey made, according to the decision of May 28, '95, showing the southerly line of the tract retained for patent; and that on July 31, 1899, owing to the Hypatia interference and the concellation of the first amended survey, the Kohnyo claimant was again given sixty days within which to apply for said amended survey.

Another conclusive fact is that the above mentioned order of July 15, 1898, affirmatively canceled the Kohnyo entry as to the southerly tract—the tract here in controversy. This order of can-

cellation is based upon the following declaration:

> "In view of the fact that *no motion for a review of the departmental decision of May 7, 1898*, affirming the decision of this office May 28, 1895, was filed within the time prescribed by the rules of practice, *the decision last mentioned became final*, and it now devolves upon this office to execute the same."

This language absolutely forbids any possible controversy as to the understanding, meaning, and intent of the Land Department in the premises. The decision of May 7, 1898, was the final decision of the Secretary of the Interior; the cancellation was not based upon a failure to appeal from the order of May 28, 1895, but upon a failure to appeal *from the decision of May 7, 1898*, the declaration is expressly made that, by such failure to appeal from the latter decision, "the decision last mentioned (May 28, 1895,) *became final;*" what does the land department mean when it says that the decision of May 28, 1895, became final on May 7, 1898; obviously that the earlier decision did not become final until the latter date; and it follows, of course, that its operation was suspended in the meantime, and until it became final.

Thus it appears beyond possibility of question that the Land Department itself considered the operation of the decision of May 28, 1895, as suspended until the decision of the Secretary of May 7, 1898, affirming the same. And we submit that counsel will not be heard to challenge the

correctness of the department's view and proceeding in that matter; such a challenge would be a collateral attack, which, as we will presently more fully show, is not allowable.

But now let us consider this subject for a moment from the standpoint of reason and logic. The decision of May 28, '95, (Exhibit "A"), denied the Kohnyo applicant the privilege of patenting *both* ends of its claim; such denial was based solely upon the ground that the two portions of the claim were segregated by the corner of a patented placer location; but, under the law, as we have already seen, if the Kohnyo vein extended through this placer ground and was known by the placer applicant to exist at the time of his application for patent, that vein did not pass by the patent—title thereto remained in the government, and it was subject to location; with that fact established, the objection of the land department would be obviated, and the Kohnyo claimant *would be entitled to patent both ends of the claim;* together with the vein and a strip of land through the placer location.

Under these circumstances the Kohnyo claimant applied to the department for permission to institute a proceeding for the purpose of demonstrating the above fact, viz: That the placer applicant knew of the existence of the Kohnyo vein in the placer ground at the time of his application for patent; the department granted this permission, and the subsequent proceedings during said period

of three years were mainly devoted to the trial and determination of that question.

If the Kohnyo applicant had succeeded in establishing its claim, the result would have been to entitle it to maintain its entry throughout, and, as we have seen, patent both tracts covered by the original Kohnyo location. Obviously, therefore, until that question was determined, it would not have been proper for the department to proceed, or to force the Kohnyo claimant to proceed, to patent one of the segregated portions of that claim. Counsel say that this controversy was between the placer patentee and the Kohnyo alone. It may be true that the proceedings in the land department were conducted by and in the names of these two parties; but the United States was as much interested as if it had been a party. For upon the decision of this controversy depended the *extent of ground outside the placer claim, to be covered by the Kohnyo patent.*

It is, therefore, perfectly clear that the said intervening proceedings in the land department were rigidly and properly construed by that department to operate as a supersedeas of the decision of May 28th, 1895.

Second. Abandonment of Tract in Controversy by Election of Kohnyo Claimant.

We now come to the other question discussed in this division of counsels' brief. Here again

counsel have consumed upwards of six pages in the citation of authorities to show that abandonment of a mining location is a question of intention, and that this intention should be evidenced by some affirmative act; also to show that the burden of proving abandonment is upon the party asserting and relying upon the same. With counsels' authorities and with the above conclusions drawn therefrom we have no quarrel. We say, as we said in our opening brief, that the record in this case establishes the fact of abandonment not merely by a mere preponderance of proofs, but beyond a possible doubt.

We do not here propose to repeat the argument made in that brief, nor will we multiply authorities upon legal propositions upon which there is no controversy between appellee's counsel and ourselves. We merely pause long enough to briefly recall attention to the facts upon which we rely as showing such abandonment, and apply to them the conceded legal principles.

Counsel say that we place our main reliance upon the proposition that the filing of Exhibit "H" in the Land Office was an abandonment of the southerly tract of the Kohnyo location. They are correct in this assertion. That is, we maintain that said southerly tract did not revert to, or become a part of the public domain, after having been covered by the Kohnyo location until Exhibit "H" was filed in the Land Office; the decision of the Secretary of Interior affirming the decision of

the Commissioner, dated May 28, 1895, upon which the Scorpion attempted location was evidently based, not having operated to produce this result.

It is difficult to comprehend the drift of counsels' ideas upon this subject. They seem inclined to apply to the abandonment of a mining location the principle that would be applied to the loss of a fee simple title to a piece of agricultural land. If we are not correct in this suggestion, we cannot account for the following quotation from Washburn on Real Estate, at page 86 of their brief:

> "It is probably, therefore, not too strong a conclusion to assert that in no case can a man lose his title to a freehold in land by an act or oral declaration of abandonment unless it comes within the category of estoppel."

What this question, or the doctrine announced by it, has to do with the abandonment of a mining location, we cannot discover. Surely counsel have been practicing mining law too long in Colorado, not to be aware of the distinction in this respect between the two interests in land. That a mining claim to which patent has not issued, and which is held merely by virtue of possession, together with the performance of certain acts of location can be abandoned more easily than title to a freehold estate in agricultural land, counsel most assuredly have no thought of denying.

Again counsel say, at page 81 of their brief:

> "To acquit himself (appellant) of this burden, appellant is then bound to prove a

concurrence of the intention of the Kohnyo claimant to abandon this tract, and the claimant's actual corporeal desertion thereof."

This is putting the requirements in relation to abandonment very strong, to say the least. In our judgment they are too exacting. Undoubtedly there may be declarations and acts, by the locator, which, without an "actual corporeal desertion," would be held to constitute an abandonment, especially where another has acted upon the strength of such declarations and acts. And where the locator has expressed his intention to abandon by such an affirmative act as is shown in this case, the abandonment will be considered as established in the absence of proofs showing a revocation or attempt to revoke by such locator. To say that, in a controversy between third persons claiming the ground abandoned, to make a *prima facia* case additional proofs must be adduced showing the actual physical desertion of such ground by the former locator, *supplementing his specific written relinquishment sworn to and filed in the land office*, would be a most unreasonable requirement.

But the record in the case at bar is amply sufficient to meet even counsels' unreasonable demand in the premises. When the Kohnyo claimant filed in the land office "Exhibit H", in which it elected to retain the northerly end of that claim and go to patent therefor, that election, *construed as it should be with reference to the commissioner's*

order of May 28th, 1895, necessarily constituted or resulted in an abandonment of the southerly portion of said claim. But counsel are nothing if not technical; they ask how "Exhibit H" can constitute an abandonment of the southerly tract of the Kohnyo claim when that tract is not even mentioned therein; and they further ask if there is anything in "Exhibit H" tending to show, either "directly or inferentially", that The Cripple Creek Mining Company "actually deserted the southerly tract of the Kohnyo claim."

It is difficult to answer such a question, under the circumstances here presented, with gravity. In so far as an express statement in "Exhibit H", that the southerly tract was relinquished, is concerned, we reply that such express statement was wholly unnecessary in view of the decision or order of the commissioner, to which order "Exhibit H" was responsive; such a declaration would have been entirely superfluous. When the commissioner said, you may choose which tract you will retain and patent and the entry will be canceled as to the other tract, the selection by the Kohnyo claimant of the northerly tract was as much a declaration of relinquishment or abandonment of the southerly tract as if specific words had been incorporated announcing such relinquishment or abandonment.

To the other branch of counsels' question, we reply that, if it were necessary for this record to show "an actual desertion" of the southerly tract

of the Kohnyo, their client has furnished amply sufficient proof on the subject. Appellee evidently considered that this tract had actually been *corporeally deserted* by the Kohnyo claimant; for, prior to the filing of "Exhibit H" in the land office, he attempted to relocate this ground as the Scorpion claim. Under the law, as we have seen, only unoccupied public land is subject to location; and we may very properly point to this attempted Scorpion relocation as sufficient evidence that the ground was physically unoccupied, in the absence of proof to the contrary. We might, by reference to other matters in this record, reinforce our position in relation to physical desertion, or to physical occupancy.

We cannot conceive of any more clear or efficient manner of indicating an intention to abandon, together with an actual abandonment, than appears in the record before us. Usually abandonment of mining ground takes place by the parties simply leaving the same, quitting the possession thereof; or by some mere verbal declaration of an intention to relinquish, coupled with failure to continue the possession and development. But, in this instance, the Kohnyo claimant files a written declaration in the land office, where the entry was made, asserting, in language so plain that it cannot be mistaken, both the intention to relinquish and the relinquishment of the southerly tract of the Kohnyo location, and also the waiver of the privilege given by the commissioner to retain said

tract; already an attempt has been made to relocate this tract, by appellee, as the Scorpion, and the filing, by the Kohnyo claimant, of its election is speedily followed by the relocation, by appellant, as the Hobson's Choice; while at a later date a third relocation of the ground is attempted under the name of the P. & G. claim; the record *does not show any effort on the part of the Kohnyo claimant whatever to recall its relinquishment or to reoccupy the ground.*

With all due respect, we suggest that it is only a diseased imagination that could avoid the conclusion, both as a matter of fact and of law, of abandonment from these acts, declarations and circumstances. If the Kohnyo claimant had, after filing "Exhibit H" in the land office and thus giving notice to all the world of its intention and of its execution of such intention, attempted to retake, or even to relocate this piece of ground after another had entered thereon and begun the initiation of a right thereto, no one would have been swifter to denounce such fact as a fraud and in violation of all principles relating to mining law than would the learned counsel of appellee.

We say, therefore, in conclusion, upon this branch of the case, and upon this division of counsels' argument, that the two propositions upon which we rely and which were questioned by them are established beyond any sort of reasonable contradiction. That is to say—we reassert that the proceedings in the land department during the three

years subsequent to the entry of the commissioner's order of May 22nd, 1895, did constitute a supersedeas or suspension of the operation of that order so that it became operative and final only upon the rendition of the judgment of affirmance, by the Secretary of the Interior, on the 7th of May, 1898; and we also reassert that the filing of "Exhibit H," especially when taken in conjunction with other matters appearing in this record, constitute a voluntary abandonment by the Kohnyo claimant of the southerly tract of that claim; and that then, for the first time after the original location of the Kohnyo, did that tract revert to and become a part of the public domain. And, finally, we repeat the inevitable conclusion that, since the Hobson's Choice was the first location of the ground made after such abandonment, it was valid and its owner entitled to a decision in his favor.

Counsels' Kohnyo Patent Criticism.

In our opening brief we refer to the fact that a patent finally issued for the north end of the Kohnyo location in pursuance to the order of the Commissioner of May 28th, 1895. We made this reference as in and of itself alone demonstrating the abandonment of the southerly end of the Kohnyo. Counsel gleefully call attention to the fact that the stipulation and exhibits do not affirmatively show the actual issue of the Kohnyo patent. This is strictly in line with their persistent endeavor to defeat our rights upon the merest and

shadowiest technicalities. They do not deny that this patent did actually issue; they are here again attempting to make use of an insignificant and at most an inadvertent omission from the stipulation of a fact that was not in any manner controverted by either side during the trial.

But, if we concede to them whatever satisfaction there may be in grasping at this straw, it does not aid them. For, as we have already seen above, it is wholly unnecessary that the Kohnyo patent to the north end of the claim should have actually issued, or that the stipulation should have included the fact of such issuance. We have demonstrated the abandonment of the tract in controversy by the Kohnyo claimant in the last foregoing pages of this brief, by the declarations and acts of such claimant, together with the acts of the parties to the present controversy, so plainly and fully that nothing more is necessary. And while the issuance of the patent to the northerly Kohnyo tract would be an additional fact bearing upon this question, no reliance whatever upon such fact by us is required.

Responding to the stringent and technical rule touching what is necessary to constitute abandonment urged by counsel, we call attention to the following declarations by Mr. Lindley.

In Section 644 of his work, he says:

> "Abandonment is a question of fact to be determined by the jury. *No arbitrary rule can be laid down which will satisfy all cases.* The question being one purely of

> intent, the fact is to be determined by the acts and conduct of the party. Upon a question of abandonment, *as upon a question of fraud, a wide range is allowed*, for it is generally only from facts and circumstances that the truth is to be discovered."

And again, in concluding the section, he says:

> "Abandonment may also be proved by the acts and conduct of the party even against his express declarations to the contrary."

In the case at bar, as we have seen, the Kohnyo claimant not only filed in the United States Land Office an express and sworn statement in writing effectually relinquishing all claim to the southerly tract—the tract in controversy here—but he has never since made any claim to this tract, or any objection of any kind whatever to its occupancy and attempted relocation by the three different parties to the present controversy.

But we have said more than enough upon this subject, and we therefore leave it.

III.

APPELLEE'S AFFIRMATIVE ARGUMENT.

The remaining portion of appellee's brief is devoted to the affirmative branch of his argument. The previous ninety pages are consumed with a discussion of the two alleged omissions from the stipulation of facts, and a reply to our arguments that the operation of the Commissioner's order of

May 28, 1895, was superseded during the subsequent proceedings in the Land Department, and that the southerly tract of the Kohnyo claim was abandoned by the act of filing Exhibit "H" and other acts shown by the record.

The fact is that appellee, when he attempted to make the Scorpion location, did not doubt either the validity of the Kohnyo location, or the segregation by that location from the public domain of the southerly end of the claim. The belief of appellee at that time is shown by his acts; he assumed that the decision of affirmance by the Secretary of the Interior, on May 7, 1898, operated to restore this tract to the public domain, for six days later he hastened to relocate the same as the Scorpion; on July 15th following, the very day on which the Kohnyo entry *was formally canceled* as to the southerly tract, he filed an amended location certificate of the Scorpion.

Moreover, at the time of the preparation of the stipulation of facts in this case, the question discussed by the parties was as to which date the ground in controversy reverted to and became a part of the public domain. Did this result from the final decision of the Secretary on May 7, 1898; or did it result from the filing by the Kohnyo claimant, in the Land Office, of its election to retain the northerly tract and hence to relinquish the southerly tract, on June 14, 1898; or, finally, did such restoration to the public domain take place only upon the formal cancellation of the entry by the Land Office, on July 15, 1898?

Our object in recalling the court's attention to these matters, which are considered in our opening brief, is twofold: *first*, to show how, during the pendency of this cause in the courts, counsel for appellee have shifted their position and are now taking their stand and making their fight upon lines altogether different from those originally contemplated; and, *second*, to bring out clearly the fact that they have wholly abandoned the view that the *decision of the Secretary of the Interior operated to restore the tract in controversy to the public domain.* Throughout their ingenious and exhaustive brief they make no allusion to or reliance upon that proposition.

First. Filing of Scorpion Amended Location Certificate Availed Nothing.

At page 115 of counsels' argument, they refer very briefly to their amended location certificate above mentioned, filed on the 15th of July, '98; they cite the state statute in relation to the amending of defective location certificates, the taking in of portions of abandoned claims, etc., and then claim that that statute aids the imperfect location of the Scorpion.

Responding to this specific contention, we say: *first*, that the filing of the amended location certificate could not and did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo,

a valid and subsisting location at the time that shaft was sunk. The case of Armstrong v. Lower, *supra*, and other cases, clearly demonstrate that under such circumstances the sinking of the discovery shaft *is a nullity* in so far as giving any legality or strength to the location is concerned. And before this ground could be relocated, after it became public domain, not only was it necessary to file an amended location certificate of the Scorpion, but it was also necessary to *sink a new discovery shaft, or to sink the old discovery shaft at least ten feet deeper.* This latter act was not done; there is no pretense of any attempt to perform it.

But, *second*, another vital and all-sufficient reason why the filing of this amended certificate of the Scorpion on July 15 could not and did not operate to perfect the Scorpion location, is that the Hobson's Choice had previously been located upon this ground. The ground in controversy did not revert to the public domain until the abandonment thereof, on June 14, '98, by the filing in the Land Office of Exhibit "H," and the Hobson's Choice location, made ten days later, was valid; therefore even if the Scorpion invalid location could otherwise have been made legal by the filing of the amended certificate on July 15, the Hobson's Choice location created intervening rights in favor of a third person which would certainly prevent such effect.

It is surely not necessary to cite authorities to this court upon these propositions; they are so

familiar and well known to mining lawyers as to render such citation superfluous.

Appellee's Doctrine of Relation.

At this point we might as well refer, in passing, to counsels' remarkable contention beginning at page 110 of their brief, that in some mysterious manner the formal order of cancellation of the Kohnyo entry made on July 15, 1898, related back to and became effective from the date of the Commissioner's order, to-wit, May 28th, 1895; so that at the expiration of sixty days after said May 28th, the tract in controversy must be held to have reverted to the public domain and become subject to relocation.

In view of what has already been said in the present brief on the subject of the suspension of the Commissioner's said order, it is certainly not necessary for us to dwell upon this proposition at any length. The Commissioner's order or judgment was, by its express terms, not to become operative until the Kohnyo applicant made his election or until the expiration of sixty days from said May 28th. This judgment of the Commissioner was, as we have seen, very different from the ordinary judgment holding an entry for cancellation where nothing further is to be done except to review the correctness of the decision, by its own terms this judgment was not final as to the particular tract—the northerly or southerly—to be ultimately relinquished. Had the applicant

so elected, he might have retained the southerly tract—the one here in controversy—and in that event, the northerly tract would have been canceled.

It requires no trained intellect, and no extended experience with mining law to discover the difference between the Kohnyo order and the kind of orders referred to by Lindley at Section 772, upon which counsel rely in this connection. The phrase, "held for cancellation," as there employed by Lindley, refers to ordinary cases where, upon the ground of fraud or of some other fatal objection, the Commissioner has absolutely and positively decided to cancel the entry or a portion of it; it does not refer to cases where the Commissioner has not so decided, but has, on the contrary, given the claimant the right of election to hold and go to patent for the specific tract.

Again, this reliance of counsel fails because, as we have fully seen heretofore, the said judgment or order of the Commissioner of May 28, did not become final until the decision of the Secretary on May 7, 1898. And the time within which the Kohnyo claimant was authorized to make his election as to which tract he would proceed to patent was extended by the action of the department itself until sixty days from said last mentioned decision by the Secretary.

There is nothing, therefore, in this position, when examined and understood, with reference to the facts in the present case. Its introduction into

this argument only tends to show how difficult it is for counsel to find something upon which to maintain themselves in this court.

Appellee's Last Reliance, Considered.

Realizing the inherent weakness of their cause and the inadequacy of arguments resting upon the assumption of a valid location by the Kohnyo claimant of the ground in controversy, counsel again turn their batteries against that claim. We have considered their assertion that the record does not show the validity of that location. They now execute a flank movement. If we understand them rightly, they say that—admitting the Kohnyo location to have been valid, nevertheless *it could not legally cover or include the southerly end of that claim*. Their argument is that in this regard the Land Department misunderstood or misapplied the law; that any attempt to cover by a single lode location two tracts that are segregated by the corner of a placer claim is unlawful and futile. And hence that the tract here in controversy always remained a part of the public domain, until staked and occupied as the Scorpion. Our answer to this position is twofold:

Second: Territorial Extent of Kohnyo Location Res Judicata and not Subject to Collateral Attack.

A full and complete answer to this branch of

the argument of counsel is that the matter they seek to discuss is no longer an open question. The action of the Land Department with reference to the Kohnyo claim is conclusive—it cannot be questioned in the present controversy.

There is no doubt but that this territory was, under the land laws, subject to sale, and the full jurisdiction of the Land Department in connection therewith must be conceded; it follows, therefore, under the universal current of authority that the decision of the Land Department pertaining to the regularity of its occupation and purchase was final and conclusive; this is especially true since there was no attempt to re-examine or review in the courts the action of that department *in connection with the Kohnyo location and patent proceeding.*

Our position is that since the Land Department having full and plenary jurisdiction, treated the Kohnyo claim as a valid location in so far as both ends of that claim were concerned, and throughout the hearings and decisions up to and including the final determination, held the same to be a valid location, it is not permitted to counsel in the case at bar, which is wholly separate and independent controversy between different parties and involving different questions, to challenge either the validity of the Kohnyo location *or the territorial scope of that location.* When the Commissioner of the General Land Office on the 28th of May, 1895, investigated the subject of

the Kohnyo location in connection with its patent proceedings and made his finding and determination with reference thereto, giving the Kohnyo applicant the privilege of selecting either end of the claim and proceeding to patent therefor the pronounced in favor of the validity of the location as to both ends of the claim as plainly as if he had covered pages with express and repeated declarations of such validity. It would be absurd to suppose that he would give the Kohnyo applicant permission to *retain and patent the southerly end of that claim unless that southerly end was sufficiently covered by the original location*; and the fact that he extended the privilege of choosing and patenting the tract here in controversy, is conclusive that to his mind and under the law as he understood it, the original Kohnyo location included that tract.

Moreover, in all of the subsequent proceedings before the land department, as we have seen, extending through a period of three years, this view of the commissioner was accepted and sanctioned; and finally at the end of the period, by the decision of the Secretary of the Interior on the 7th of May, 1898, this construction was confirmed by the highest authority in the Department. For by that decision the right of the Kohnyo applicant to make his choice of the southerly end of the claim and proceed to patent therefore is re-affirmed, just as announced by the Commissioner three years before.

For a further confirmation of this view regarding the Kohnyo location, we recall attention to two additional acts of the land department, viz: The receiving, acceptance and full recognition of Exhibit "H", in which the Kohnyo claimant expresses his choice to retain the northerly end of the claim and go to patent therefor, and the formal cancellation on the 15th of July, 1898, of the Kohnyo entry as to the tract here in controversy; if the entry did not include this tract why make such cancellation?

At the date of the attempted Scorpion relocation, therefore, the Kohnyo claimant had a right to go to patent upon the tract in controversy here. He still had and for weeks thereafter retained the right to patent this tract as the Kohnyo. This he could not do if the tract were public domain; for the law requires a valid location precedent to patent. Under these circumstances it would be absurd to claim that the Scorpion location was legal.

Counsel cannot be permitted at this time and in this way and in a controversy between the present parties, to review or challenge or in any manner call in question the correctness of those land department rulings for the purpose of having them annulled or disregarded as to the ground in controversy; this is an absolutely separate and distinct proceeding between other and different parties having no connection in any manner whatever with the Kohnyo proceeding for patent. To permit the present attack would be no more excusable than to

permit the regular and valid proceedings and judgment in a suit at law between A and B to be called in question in a subsequent, separate and distinct suit at law between C and D. Even if the land department were mistaken in its view of the law, and even if counsels' contention were true (which we do not admit) and the two ends of the claim thus segregated could not legally be included within one location, yet in the present controversy counsel are estopped; they cannot be permitted to raise the question, any more than they could be allowed to collaterally attack an erroneous judgment entered by a court in an ordinary action at law.

It would seem to be hardly necessary for us to refer Your Honors to authorities upon these propositions. The law is so clear, well known and unanimously recognized. Of course, if an ordinary suit in the courts instead of the Kohnyo location and patent proceedings before the land department, were here involved, counsel would not for a moment think of presenting this argument; but, as we have already suggested, there is a little, if any, difference between the two cases. The action of the land department in matters within its jurisdiction is just as conclusive and binding and impervious to collateral attack as is judicial action by one of the ordinary and usual judicial tribunals.

The Authorities.

Says Mr. Justice Field, in Steel v. Smelting Co., 106 U. S., at page 450:

"We have so often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, *the acts he has performed to secure the title*, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

The same learned Judge, in Smelting Co. v. Kenp, 104 U. S. 640, employs the following language:

"That instrument (the patent) duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is entrusted *that all the requirements preliminary to its issue have been complied with.* The presumptions thus attending it are not open to rebuttal in an action at

law. It is this unassailable character which gives to it its chief, indeed its only, value as a means of quieting its possessor in the enjoyment of the lands it embraces."

Decisions to the foregoing effect might be indefinitely multiplied. These decisions, it is true, speak of instances where the patent has issued. But the principle of *res judicata* or freedom from collateral attack announced is equally true where final entry has been made. The receiver's receipt indicates the final judgment of the land department upon all preliminary matters just as fully as does the patent. The patent itself only puts in a different form the evidence of such determination.

Says Mr. Lindley, in Section 208:

"The final certificate issued by the receiver of a United States Land Office after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held *to be the equivalent of a patent.*"

And again, in the same section, he says:

"Generally speaking and for all practical purposes, the issuance of the final certificate to an agricultural entryman closes the case, *and no collateral attack on the certificate so issued is allowed.*"

It is hardly necessary for us to add that in this particular there could be no distinction between the final certificate to agricultural land and the final certificate to mineral land.

It is true the patent did not issue to the Kohnyo claimant for the tract of ground here in

controversy. It is also true that the final entry of that piece of ground was ultimately canceled; but such cancellation *did not rest upon any fraud, defect, or inherent weakness in the original location* which rendered the same illegal or void, or in the patent proceedings and entry. On the contrary, as we have seen, the land department throughout held all of these proceedings *sufficient to entitle the Kohnyo claimant to proceed to patent for this particular tract.* If this were not so, that department could not and would not have authorized the Kohnyo claimant to make his election and to retain this particular tract.

Our position therefore, is that the entry should in the present action be regarded as covering the tract in controversy and as segregating it from the public domain until the point of time when the Kohnyo claimant saw fit, by making his election, to abandon that tract. *By this act, and by this act only, did he waive his right to patent this tract and express his election to permit the receiver's receipt to be canceled in relation thereto.*

It will be observed that we do not rely upon the formal cancellation of the receiver's receipt by the land department. Had there been no provision authorizing the Kohnyo claimant to make the election mentioned, the receiver's receipt would have been sufficient to protect the ground from reentry until the date of cancellation. But, in view of the authority given by the Commissioner in his decision, to the Kohnyo claimant to make his elec-

tion between the two tracts undoubtedly the latter's act in filing Exhibit "H" must be construed as a relinquishment of all claim to the tract here in controversy, and as restoring the same to the public domain.

The subsequent formal cancellation of the entry did not itself operate to restore this tract to the public domain. So much counsel concede.

To the authorities cited in our opening brief upon the last question we add: Rebecca Gold M. Co. v. Bryant, a very recent decision by this Honorable Court; it is reported in 71 Pac., page 1110. The cancellation of the receiver's receipt in the instance here under consideration did not change the status of the ground; it merely expressed in a formal manner and placed of record the prior fact of abandonment and restoration to the public domain.

Third. Kohnyo Location Did Include Southerly End of Claim.

It is clear from the foregoing argument and authorities that appellee will not now be heard to question the sufficiency of the original Kohnyo location as to the ground here in controversy. But if this were not so, and if that were still an open question, and the attempt to present it were not a collateral attack, counsels' argument fails to demonstrate that the construction of the law by the Land Department in the premises was erroneous.

They admit the correctness of the view taken

in Armstrong v. Lower, 6 Colorado, and in other cases, that when the various acts of location required by law have been performed, the presumption obtains that the vein extends throughout the claim lengthwise. But they say that this presumption was overcome by the interposition of a portion of the placer ground between the two ends of the Kohnyo; from this fact they infer that the continuity of the Kohnyo vein was destroyed, and therefore the location never rightly included the southerly end of that claim.

In their discussion of this subject we note two singular circumstances, viz: Among the land decisions they cite only the following cases: Andromeda Lode, 13 L. D. 146; Mabel Lode, 26 L. D. 675: and The Bimetallic Mining Company, 15 L. D. 309. The first two of these decisions are cases where the lode claims were segregated *by millsites;* in the remaining case such segregation was caused *by agricultural land;* these cases, therefore, are not analogous to the case under consideration for the reason that the Kohnyo was thus segregated *by the corner of a placer claim.*

As we shall presently see, the foregoing distinction may be very material. The millsite and the agricultural land are, of course, non-mineral; while the placer claim is and can only be entered as mineral ground. The law does not recognize in any manner the existence of a lode or vein in either agricultural land or millsites. On the contrary, the existence of veins in placer ground is a

matter of common and frequent occurrence, and even the statute itself clearly recognizes such existence. Not only this, but under certain conditions a placer patent does not cover or convey a vein within the placer—such vein remaining, notwithstanding the patent, and notwithstanding there be no adverse proceeding, a part of the public domain and subject to location and entry by a third person. This condition takes place whenever the placer applicant, at the date of his application for patent, knows of the existence of the vein in the placer ground, but makes no effort to cover the same himself by a valid lode location.

It logically follows, therefore, that while counsels' contention to the effect that a patent to a millsite or to agricultural land may be treated as tending to show that there is no mineral vein within the territory, is probably correct, their conclusion in the present case is not a necessary or even a reasonable sequence. The Kohnyo was not segregated by agricultural land or a millsite; it was segregated by the corner of a placer claim; we may very reasonably infer that the Kohnyo vein did extend through the placer. Certain it is that the issuance of the placer patent ought not to be treated as any evidence whatever that the Kohnyo vein did not exist in the Mt. Rosa placer. But if it be not treated as such evidence, there is nothing in the record to overcome the presumption of continuity of the vein, established by Armstrong v. Lower, and other cases.

At this point we call attention to the other singular circumstance connected with counsels' discussion. They make a curious mistake as to the issue tried by the land department after the Commissioner's order of May 28th, 1895. They assume and state in at least half a dozen different places that the question considered in those proceedings was, whether or not the Kohnyo vein *existed* in the intervening corner of the placer claim. In this they are radically mistaken. The question was not, did the vein exist in that ground? It was, did the placer applicant at the date of his application for patent *know that it existed* within that ground? There is not one word in any of the proceedings in the land department showing or tending *to show that the vein did not exist in the placer*, or that the fact of its existence therein was even considered; if any inferences could be drawn from the language of the different decisions on the subject, it would be that the vein *did exist* in the placer; the sole and only issue tried was confined to the question whether the placer applicant at the date of his application *knew* of the existence of the vein in placer ground. The broadest scope that can be given to the result of those proceedings is that they simply determine that the placer applicant *did not know* at the date of his application for patent of the existence of the Kohnyo vein within placer ground.

There is, therefore, logically and in reason no difficulty about applying to the present question

the doctrine of the Armstrong-Lower case; it is not correct to say that the presumption recognized in that case was overcome by anything connected with the Kohnyo proceedings; on the contrary, it would seem to be only reasonable and proper to treat that presumption as applicable notwithstanding such proceedings. So that (discussing this matter from the standpoint of counsels' argument) if the question could properly be considered in the present controversy, the burden was undoubtedly upon appellate to show that the Kohnyo vein did not extend into or through the southerly end of that claim, which is the ground here in controversy; he offered no proof upon this subject; he did not in any manner discharge or attempt to discharge the burden that was upon him in this regard. And if this branch of the case rested upon the propositions considered by counsel, they have failed to sustain themselves.

Further land decisions considered.

Disclosing the distinction we have made above as to mineral and non-mineral land, we have only to refer to the extract from the Mabel Lode case quoted by counsel at page 99 of their brief, which is as follows:

> "Where a lode or vein abuts upon *non-mineral land*, there is no authority of law for including in a location made on such lode or vein any ground beyond such abutment, and certainly not to embrace land lying beyond the *non-mineral tract*."

Your Honors will observe how carefully the conclusion of the department regarding the exclusion of a segregated portion of the vein is limited to the case of the intervention of *non-mineral land.* But if we were to assume that the Mabel Lode and other cases relied on by counsel were, notwithstanding the fact that they deal with non-mineral interferences, to be treated as on the same footing as the Kohnyo Mt. Rosa placer interference, then we say that whatever there may be, if anything, inconsistent between the declarations contained in those cases and the declaration of the department in the Kohnyo case must be resolved in our favor. Because if these cases are analogous, the Kohnyo, being much the later one, construes, supersedes or modifies the earlier ones. And unquestionably the view adopted in the Kohnyo case is, as we have seen, that the presumption exists of the continuity of the Kohnyo vein beyond the placer interference and into the tract in controversy, and hence the sufficiency of the location as to that tract, obtains. And the law as estabiiahed by the Kohnyo decision undoubtedly is that the location may include and the claimant may patent that portion of the lode claim which *lies beyond the interfering placer territory.*

Nor does the Kohnyo decision stand alone in this regard; the view of the land department adopted in that decision has been since recognized and re-declared. Moreover, this view has been broadened or extended, and it has been applied

even to the case where the segregation was caused by non-mineral land, to-wit, a millsite. The case of the Paul Jones Lode, 28 L. D 120, was determined in 1899, nearly four years subsequent to the determination of the Kohnyo matter. The Paul Jones Lode was cut into two single tracts by the Gladstone millsite; this case, like the Kohnyo case, was first passed upon by the Commissioner, and several years later by the Secretary of the Interior. The Commissioner held that both ends of the Paul Jones Lode could not be patented, but that since

> "much the greater part of the Paul Jones Lode claim lies southeasterly from said millsite, claimant may, if he so desires, retain that portion of his claim, providing he can show a discovery of mineral thereon, and that five hundred dollars have been expended in labor or improvements upon that part of said claim."

and the applicant was allowed thirty days with which to elect which end of the claim he would patent.

In his decision the Secretary of the Interior, after reviewing the case, concludes:

> "There appears to be no error in your official decision of November 14, 1893, holding that the Paul Jones quartz lode mining claim could only stand for one or the other of the two parts, and giving the claimant the privilege of retaining the larger portion by showing a discovery of mineral thereon, and that five hundred dollars in labor or improvements thereon had been expended."

And, singularly enough, the learned Secretary declares that this conclusion and decision are supported by the three cases above mentioned, cited by counsel in their brief.

It follows, therefore, that counsel for appellee in the case at bar, in attacking that portion of the Kohnyo location which gave the applicant a right to choose and patent the southerly end of the claim are confronted with another and later decision of the Land Department clearly recognizing and re-affirming the view they challenge.

We are content to risk without further discussion the position taken by the Land Department in these two decisions. The contrary view of counsel, unsupported by authority, that the Commissioner arrogated to himself a power he did not possess, and that both he and the Secretary of the Interior recognized a radically erroneous principle when they allowed the Kohnyo claimant to choose the southerly portion of the claim and proceed to patent therefor, will hardly be accepted by this or any other court.

We close this brief with the quotation, although it is hardly necessary, of a few extracts from Mr. Lindley.

In Section 413 of his work, the learned author says:

> "On the other hand lodes found within the placer surface or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. * * * The issu-

> ance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied for by the placer claimant as as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he had no right to it.

Commenting upon the fact that in placer proceedings the Land Department requires a couple of affidavits to the effect that there are "no known lodes within the placer," and declaring such requirements superflous, Mr. Lindley, at Section 703, further says:

> "It is not a fact necessary to be determined in such proceeding. If such a lode existed, although not located at the time of the filing of the application for a placer patent, it is reserved by operation of law, notwithstanding any adjudication made by the Land Department in the placer proceeding."

And again, in commenting upon the fact that there need be no adverse for a known lode against a placer application for patent, Mr. Lindley, at Section 720, says:

> "Where the existence of the lode is known and the placer applicant fails to assert his right to it by including it within his application, such failure is a conclusive declaration that he has no right to the possession of the vein or lode. There would be nothing in such an application which would call for any contest upon the part of the lode claimant. The owner of

> the known lode, if it were a located one, could not be considered as asserting anything adverse to the placer claimant. We think it well settled that such lode claimant need not, under such circumstances, institute adverse proceedings against the placer application."

We think that we have now answered all the material arguments presented by counsel for appellee in their ingenious and exhaustive brief. We still confidently believe in the correctness of our positions and in the justice of our assertion that appellant—the owner of the Hobson's Choice lode claim—ought to succeed in the present controversy. And we repeat our request that a judgment be entered or directed by this court accordingly.

After a careful consideration of the arguments, printed and oral, made on behalf of both parties, the Supreme Court of Colorado entered judgment for defendant in error Gurney, (appellant in that court), and we respectfully submit that that judgment was in accordance with the law and should be affirmed.

Respectfully submitted,

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Bi-Metallic Bank Building,
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